Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Performance Measurements and Standards for Unbundled Network Elements and Interconnection	)	CC Docket No. 01-318
	)	
Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance	)	CC Docket No. 98-56
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
Petition of Association for Local Telecommunications Services for Declaratory Ruling	)	CC Docket Nos. 98-147, 96-98, 98-141

REPLY COMMENTS OF BELLSOUTH

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REPLY COMMENTS

BellSouth Corporation, on behalf of itself and its wholly owned subsidiaries ("BellSouth"), hereby submits the following reply comments in the above referenced proceeding.

I. INTRODUCTION AND SUMMARY

1. The various parties that filed Comments in response to the Commission's *Notice of Proposed Rulemaking*[1] make three distinctly different proposals: State Commissions generally state that the plans that they have put into place are appropriate, and that there should be no Commission action that interferes with these plans. The ILECs generally state that the

[1] *In the Matter of Performance Measurements and Standards for Unbundled Network Elements and Interconnection, et al.*, CC Docket No. 01-318, *Notice of Proposed Rulemaking*, FCC 01-331, released Nov. 19, 2001 ("Notice").

state plans are unnecessarily complex and that there is an untenable degree of inconsistency between the various state plans. Accordingly, most ILECs request that the Commission adopt a streamlined, mandatory national measure. The CLECs have varying proposals, but the ultimate goal of each appears to be more measurements and/or more penalties.

2. Given the disparity in the proposals, BellSouth believes that it is appropriate for the Commission to first decide how the docket should proceed as a matter of policy. In other words, the Commission should decide whether the paramount goal of this proceeding is to streamline and reduce measurements in a mandatory plan, to add measurements and penalties in a mandatory plan or otherwise, or to take action that will disrupt the current state plans as little as possible. Only after making this additional choice between these three mutually exclusive alternatives should the Commission consider the specifics of what is necessary to implement that choice.

3. The Commission unquestionably has the legal authority to set a national standard. The language of the original Notice of Proposed Rulemaking[2] issued in this proceeding almost four years ago reflects the Commission's certainty on this point. Further, even if there were any basis for doubt, it has been dispelled by the Supreme Court's decision in *AT&T v. Iowa Utilities Board*.[3] This Commission is empowered to make rules to implement the Act, and it is also empowered to pre-empt any conflicting state rules under appropriate circumstances. BellSouth submits that this Commission should exercise its authority to set a mandatory national plan. This is the only way to achieve the goals stated in the *Notice* of streamlining the plans currently in

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[2] *In the Matter of Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection and Operator Services and Directory Assistance*, CC Docket No. 98-56, RM-9101, *Notice of Proposed Rulemaking*, 13 FCC Rcd 12817 (1998).

[3] *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) ("*Iowa Utilities Board*").

existence, and to have a plan that applies nationally (and consistently) to further the purposes of the Act.

4. The state plans currently in effect reflect a tremendous disparity, ranging from extremely extensive plans in some states, to no plan at all in other states. All plans, however, have as their sole purpose the implementation of the requirement of the Act that ILECs provide nondiscriminatory service. Given this, BellSouth submits that the incredible range of plans from state to state cannot all be consistent with the Act. It is necessary to have a consistent approach to performance measurements, and the only way that this consistency can be achieved is to have the necessary policy decisions made by a single regulatory authority. That authority can only be the Commission.

5. Moreover, setting national standards that would function as a model plan (or an advisory plan) will likely not be effective, because State Commissions that have labored diligently for years to create a plan are not likely to abandon their labors to adopt a national plan if they have the option of keeping in place the state plan. For this reason, it is necessary to order a national plan that will replace state plans.

6. The CLECs' proposals on measurements should be rejected. Essentially, these proposals fall into two categories: some CLECs argue that a national plan should be used to impose a mandatory floor on measurements, but that there should be no limit to the additional measurements States may add. Other CLECs argue that there should be a federal overlay of measurements that would apply in addition to all of the measurements under State plans.

7. The former proposal, that a mandatory floor be set, is a request for a type of pre-emption. States would be required to adopt the mandatory floor to the extent that their state plans fall below this floor. The CLECs that support this approach, however, have provided no

basis to take this action. In order for a mandatory floor to be appropriate, it would be necessary for the CLECs to demonstrate that the state plans (that is, plans without a floor) are ineffective to serve the purposes of the Act. The CLECs have failed to do this.

8. The CLEC's latter proposal calls for federal measurements that would overlay state rules. Adoption of this proposal would create a regulatory bedlam that would be impossible to administer, and that would involve tremendous expense for both ILECs and for regulators. Moreover, this suggestion is wholly without precedent. The Commission has never implemented any aspect of the Act by allowing State Commissions to do literally anything they please in a subject area, while layering on to the disparate state approaches an entirely separate set of rules. The Commission should not do so for the first time in this proceeding.

9. The measurements proposed by the CLECs also fall roughly into two categories: some are variations on the core measurements proposed in the *Notice*; others are additional measurements that go beyond those proposed in the *Notice*. As to the latter category, BellSouth does not believe that any of the measurements suggested by the CLECs are core, critical measurements that are appropriate for adoption in a national plan. As to the former category, the CLECs sometimes suggest measurements that are conceptionally correct, but that have a type of standard (*e.g.*, benchmark), a prescribed level of performance, an amount of disaggregation, and/or other business rules that are not appropriate. For these reasons, both types of CLEC-proposed measurements should be rejected.

10. Finally, the CLECs' proposals regarding penalties should also be rejected. From a policy standpoint, most of the CLECs contend that the purpose of the Act can best be served by levying upon the ILECs unlimited penalties that have the potential to amount to literally billions of dollars. These CLECs are simply wrong. Excessive penalties have just as great a potential to

lead to results that are detrimental to competition as do inadequate penalties. Specifically, excessive penalties would encourage CLECs to game the measurement system to obtain penalties, and would present CLECs with situations in which they could receive more from the receipt of penalties than they could ever earn by serving customers through appropriate competition.

11. Also, the CLECs' proposals that these massive penalties be levied automatically are inconsistent with the statutory provisions regarding the procedures that must be followed before the Commission can award damages or exact penalties. These proposals are legally unsustainable and must be rejected.

II. A PROCEDURAL PROPOSAL

12. The *Notice* raises two very different types of issues: (1) general issues, such as whether a national plan is necessary, and, if so, whether it should replace state plans; (2) specific issues, *i.e.*, whether the twelve measures identified in the *Notice* should be adopted, and what standards are appropriate for use with these measures. As one would expect, the responses of the various commentators to the specific issues are heavily influenced by their views on the broader issues.

13. The comments on the broad issues were varied, but, in general, they can be divided into three camps. For the most part, State Commissions that provided comments wish to be left alone. The collective opinion of the State Commissions appears to be that they have worked diligently to develop performance measurements in their respective states, and they do not welcome federal action that would interfere with their labor. A second group of commentators (principally ILECs) believe the current state of performance measurement development represents a patchwork of different state-adopted plans that, taken together, create an administrative burden, and, in many cases, are unnecessary. Most of these parties request a

national plan that would replace state plans, and that would be tailored along the lines of the measurement plan described in the *Notice*. Finally, a third group (composed almost exclusively of CLECs) believes that a national plan should be utilized to create even more measurements and penalties than those that are currently in effect at the state level.

14. Obviously, these three sets of parties perceive the current state of performance measures in very different ways. Not surprisingly, the three camps also have vastly differing proposals as to how the Commission should proceed. BellSouth respectfully submits that the Commission must make certain broad policy decisions first, such as the degree of Commission involvement and the form that this involvement will take, *e.g.*, creating an exclusive federal plan or a model federal plan. Only then can the Commission turn to the specifics of how to implement the framework provided by its decision on the broader issues.

15. To this end, BellSouth proposes that the Commission, in effect, bifurcate the decision-making in this proceeding into two separate phases. In the first phase, the Commission should determine the direction this proceeding will take. In this phase, the Commission should address fundamental questions such as whether further development of federal rules is necessary at this time, *i.e.*, whether the collective state-ordered plans on performance measurements are adequate to satisfy the purposes of this rulemaking, or whether additional action is needed. The Commission should also determine, if a federal plan is needed, whether that plan will constitute a model plan (that State Commissions may accept or reject), whether it will overlay the state plans without altering those plans (as some CLECs advocate), or whether this plan will be an exclusive, legally binding plan to govern ILEC (and possibly CLEC) performance. Finally, if the Commission chooses the last alternative, then it should determine whether the mandatory rules should expand on the rules in current existence (as CLECs advocate), or streamline the rules that currently exist, while making them more consistent (as the ILECs advocate).

16. After these initial decisions have been made, then the Commission can proceed to the more specific questions of how to implement these broad policy decisions. In the second phase, the Commission should again allow parties to offer specific proposals as to how to implement the Commission's phase one determinations.

III. THE COMMISSION HAS THE AUTHORITY TO IMPOSE A LEGALLY BINDING, MANDATORY MEASUREMENT PLAN.

17. Taking the initial step of deciding the course of this proceeding (*i.e.*, what should be done to address the current state of performance measures) requires a clear understanding of what can be done, that is, the extent of the Commission's authority to order a mandatory national plan. Some parties expressed doubt in their comments that the Commission has the authority to order a national plan that would replace state plans.[4] BellSouth submits that the Commission has this authority. Further, it is clear that throughout this proceeding, the Commission has expressed no doubt regarding its authority.

18. In the original *Notice of Proposed Rulemaking* issued in this proceeding in 1998, the Commission expressed an intention "to work with state commissions in developing model performance measurements and reporting requirements."[5] The Commission set forth a specific multi-step plan for doing this. First, the Commission would "adopt a set of model performance measurements and reporting requirements."[6] The intent was to allow "those states that have begun the process of developing performance measurements and reporting requirements to continue their work and incorporate the model rules to the extent they deem appropriate, while providing a comprehensive set of measurements that can be adopted by those states that have yet to begin the process."[7] Finally, the Commission stated that, "[t]he experience we gain from the

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4 Verizon Comments at 47.

5 13 FCC Rcd at 12829, ¶ 26.

6 *Id*. at 12828, ¶ 23.

7 *Id.*.

development of these model performance measures and their reporting requirements and their application by the states will, we believe, provide a more informed and comprehensive record upon which to decide whether to adopt national, legally binding rules."[8] Clearly, the Commission expressed no doubt as to its ability to adopt legally binding rules if the need arose.

19. Moreover, if there were any doubt on this point, it was dispelled by the Supreme Court's decision in *AT&T v. Iowa Utilities Board.* In *Iowa Utilities Board*, the Supreme Court addressed squarely the question of the jurisdiction and authority that is granted to the Commission under the Act, as opposed to the jurisdiction and authority of the states. The decision hinged upon the Court's judgment that Section 201 of the Act must be construed to mean exactly what it says. Specifically, Section 201(b) states, in relevant part, that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."[9] The Court interpreted this language to mean that "§ 201(b) *explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies".[10] Thus, this explicit grant of authority controls, despite the language of Section 252(c) of the Act,[11] which provides the authority for State Commissions to establish rates.

20. At specific issue was the Commission's TELRIC pricing rules. The respondents argued that the national pricing standard promulgated by the Commission conflicted with the express language of 252(c)(2), which gives State Commissions the ability to "establish any rates for interconnection, services, or network elements according to subsection (d)."[12] The Court held that Section 201 controlled, and empowered the Commission to make rules to establish a pricing methodology. The ability of the states to apply the pricing standards set forth in the Act,

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8 *Id*., at 12820, ¶ 4 (emphasis added).

9 47 U.S.C. § 201(b).

10 525 U.S. at 380.

11 47 U.S.C. § 252(c).

12 *Id*.

as well as those promulgated by the Commission, was, the Court ruled, sufficient to "constitute the establishment of rates."[13] Thus, when faced with an instance in which the general rulemaking power of the Commission pursuant to Section 201 appeared to conflict with an explicit grant of authority to the states, the Supreme Court determined that Section 201 prevails.

21. In our case, the fact that Section 201 controls is even clearer. In *Iowa Utilities Board*, the Court affirmed the Commission's ability to effectively pre-empt a state action, even when the action appeared to be explicitly authorized by the Act. In our case, the only statutory provisions that are ultimately at issue are by Sections 251(c)(2) and (3), which require incumbents to provide interconnection and unbundled network elements in a nondiscriminatory fashion.[14] The Commission has interpreted this language to require ILECs to provide service in substantially the same time and manner as they do for their analogous retail services, or, in the absence of a retail analog, in a way that provides an efficient provider a meaningful opportunity to compete.[15] Having made this decision, the Commission embarked several years ago upon the process of developing performance measurements to determine how this standard can best be met. It is true that, subsequent to this beginning, many states have acted more quickly, and have developed measurement plans of their own. This does not in any way, however, restrict the ability of this Commission to continue the labor that it has started, and to displace any state plans that conflict with any rules that the Commission creates in this proceeding. Put simply, while the Commission may choose to defer to the States, it is under no legal obligation to do so.

22. Further, the particular provisions of the Act that give the State Commissions authority to implement the Act do so only to the extent that State action is consistent with the

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13 *Iowa Utilities Board*, 525 U.S. at 384.

14 47 U.S.C. §§ 251(c)(2) and (3).

15 *In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to provide in-region InterLATA services in Michigan,* CC Docket No. 97-137, *Memorandum Opinion and Order,* FCC 97-298, released August 19, 1997 (¶¶ 139-41) ("Ameritech Michigan Order").

requirements of the Act and the rules of this Commission. For example, Section 261(c) allows States to impose requirements on carriers for intrastate services "as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part."[16] Thus, while a state would be empowered at this time to do as many have done, and adopt a performance measurement plan, if this Commission determines it is appropriate to create a national plan, then any given State's ability to maintain an inconsistent plan would cease.

23. Likewise, Section 251(d)(3) states that the Commission should not preclude the enforcement of any State Commission order, policy or regulation that is "consistent with the requirements of this Section" and "does not substantially prevent implementation of the requirements of this section and the purposes of this part."[17] Thus, the Commission may preclude any State plan that, in the Commission's judgment, is not consistent with the Act. BellSouth believes that, collectively, the plans that have been ordered in the States create such a situation.

IV. THE NEED FOR A NATIONAL PLAN

24. Again, the threshold question is whether the current status of performance measurement plans throughout the nation furthers the goals of the Act, or impedes those goals. If the Commission concludes that the former situation exists, then it should either take no action or limit this rulemaking (as originally intended) to a vehicle for issuing model rules. If the latter situation exists, as BellSouth believes, then federal action is an absolute necessity.

25. The Comments reflect the fact that virtually every state in the country has done something to address performance measures.[18] The question is whether the states' action,

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16 47 U.S.C. § 261(c) (emphasis added).

17 47 U.S.C. § 251(d)(3).

18 WorldCom comments at 2; also see WorldCom Comments, Appendix A, in which WorldCom provides its assessment of the status of the development of performance measurements in the states. According to this document, only three states in the country, Delaware, South Dakota and West Virginia, have no measurements in place and no proceeding to consider measurements.

considered collectively, furthers the purposes of the Act and accomplishes the goals that the Commission contemplated when it originally began this rulemaking in 1998. If so, the Commission need take no action. The Commission could simply defer to the states, and to the judgments that they have made, as embodied in the plans that have been implemented (or are being implemented). There is a certain equitable appeal to this approach. As a number of states point out in their comments, they have spent years developing plans after the Commission urged them to do so in the original *Notice* in this proceeding.[19] It clearly seems unfair under these circumstances to take any action that would nullify the labor of the State Commissions. As compelling as this argument is, however, the Commission should not ultimately base its decision upon the fact that individual States have already expended considerable effort. Instead, the determinative factor should be whether the states, working on their own, have independently been able to develop performance measurement plans that, considered in toto, provide an appropriate regulatory framework and further the intent of the Act.

26. If the Commission believes that the state plans are adequate to serve the purposes of the Act, then obviously no pre-emptive action should be taken. One alternative would be to follow the path the Commission originally charted, and put in place a model plan. This approach would clearly be the most innocuous, since it would not require any disruption to the state plans that are in place. However, issuing model rules would, for all practical purposes, be tantamount to doing nothing. State Commissions have spent years developing the plans that they deem appropriate, and would be unlikely now to revisit their decisions based on a non-binding model plan.

27. In its Comments, Sprint alluded to the instructive experience that followed the Collocation Interval Order.[20] In that Order, the Commission gave the states the choice of

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[19] *See*, *e.g.* Comments of the Public Utilities Commission of Ohio at 5.

[20] *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the*

adopting the guidelines set forth in the Order, or, adopting their own standards.[21] As Sprint noted, the guidelines have had little effect on the decisions of State Commissions.[22] BellSouth believes that guidelines or a model plan would have even less effect in this case, for the simple reason that State Commissions have worked even longer on performance measurement issues, and would, therefore, be less likely to voluntarily migrate to any model rules that differ from what they have worked so hard to implement.[23]

28. Thus, from a practical standpoint, the Commissions' initial decision really comes down to either determining that performance measurements as they have been developed in the states are in an acceptable state, in which case no mandatory plan need be ordered. If, however, the Commission determines that the current national status of performance measurements is in need of change, the creation of a legally binding plan, which would supercede state plans, is the only way to effect this change.

29. A mandatory national plan is necessary for two reasons: 1) to resolve the present gross inconsistencies from state to state and plan to plan which, considered as a whole, are contrary to the purposes of the Act; 2) to streamline the many differing plans into a single, appropriately-sized national plan.

Telecommunications Act of 1996, CC Docket Nos. 98-147 and 96-98, *Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98*, 15 FCC Rcd 17806 (2000) ("*Collocation Interval Order*"), cited in Sprint Comments at 7.

[21] *Collocation Interval Order*, 15 FCC Rcd at 17819, ¶ 22; the *Order* also mentioned a third alternative, setting intervals and standards by negotiation of the parties. *Id*.

[22] Sprint Comments at 7-8.

[23] One other alternative would be for the Commission to develop a plan that would apply solely as a default, that is, to apply when a State Commission has taken no action to develop a measurement plan, and intends to take no action. However, given the fact that almost every state has either put a measurement plan in place or begun the process to do so, any default plan would likely be adopted by a State infrequently, if at all.

30. On the first point, the problem is not that any particular state (or states) has ordered a plan that is inappropriate,[24] but rather that the various states have resolved the question of what is appropriate in ways that differ so dramatically from one another that they cannot all be consistent with the Act. Any performance measurement plan is ultimately nothing more than a mechanism to ensure that the nondiscrimination standards of the Act are met. Thus, ultimately, a decision as to the appropriate form of any performance measurement plan must be a policy decision. The only way that an appropriately uniform policy can be applied is if it is created and implemented by this Commission.

31. Reviewing the comments of the ILECs, it is obvious that there is currently a patchwork of plans throughout the country that includes, from state to state, different measurements, different degrees of disaggregation, different standards, and different business rules. As BellSouth noted in its Comments, the first three plans to be ordered in the BellSouth's region have resulted in from 2,000 to 13,000 submeasures, varying benchmarks and two completely different enforcement mechanisms.[25] Other ILECs have obviously had similar experiences. Verizon reported in its Comments that it is "currently subject to at least seven separate sets of state reporting requirements, in addition to the two federal reporting regimes, and reports approximately 2.4 million wholesale performance results each month."[26] Likewise, SBC stated that the various plans offered in its region from state to state include "between 105 and 119 separate measurements, with between 659 and 2,084 sub-measurements."[27]

32. Further, the existence of crucial differences from state to state was also noted by CLECs. For example, Covad stated that "[a]s a result of the lack of federal rules, Covad's

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24 Although as discussed in its Comments, BellSouth believes that many state plans are more extensive than necessary. BellSouth Comments at 10-15.

25 Comments of BellSouth at 12.

26 Verizon Comments at 2.

27 SBC Comments at 6.

quality of service varies on a state by state, ILEC-by-ILEC basis to take account of the widely different provisioning intervals put in place across different states."[28] This regulatory patchwork creates obvious practical problems. This situation also gives rise to a critical legal problem.

33. Focusing for illustrative purposes on only the size of the state-ordered plans, the range in the number of submetrics in the plans that have been ordered by State Commissions extends to more than 10,000 submeasures. In the states that have adopted no plan, there are obviously no measures. Whatever the statute's requirement of nondiscriminatory treatment means, it must mean something that is reasonably susceptible to consistent interpretation and application. It is simply not possible for the application of the nondiscriminatory standard to require ten thousand submetrics for proper implementation in some locations, but to be properly implemented with absolutely no measurements in other locations. One of the most fundamental tenets of statutory interpretation is that the provision in question must be interpreted in a way that makes sense.[29] The Act's requirement of equal treatment, however, would be rendered nonsensical if it were allowed to serve as the basis for literally anything that an independent state regulatory body deemed appropriate, ranging from no plan whatsoever to a plan that requires thousands of sub-measurements. The requirement to provide non-discriminatory service cannot mean literally anything that any one of fifty different State Commissions determines it to mean.

34. Further, in many states, the performance measurement plans that have been adopted apply only to RBOCs, not to other ILECs. Thus, there are states in which a plan with thousands of measures apply to one incumbent, but no plan applies to other incumbents that

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[28] Covad Comments at 18.

[29] "In an effort to effectuate legislative intent, the court is authorized to 'make sense out of a statute.'" *Drew v. Chrysler Credit Corp.*, 596 F.Supp. 1371, 1374 (W.D. Mo. 1984), quoting *Bank of Belton v. State Banking Board*, 554 SW 2d 451, 456 (Mo. App. 1977); "A statute should be construed to avoid imposing impossible, impractical and futile conduct" *Id.*; "As the Supreme Court cautioned judges eighty years ago '[a]ll laws should receive a sensible construction,'" *Cartledge v. Miller*, 457 F.Supp 1146, 1158 (S.D.N.Y. 1978), quoting *Holy Trinity Church v. United States*, 142 US 457, 461, 12 S Ct 511, 512, 36 L Ed 226 (1892).

provide comparable service in the same location. This, too, is incompatible with any rational interpretation of the requirements of the Act. Section 251(c), [30] which sets forth the duties of incumbents, makes no distinction between RBOCs and other incumbents. Applying vastly different requirements to some ILECs in the form of a measurement plan, while exempting other ILECs in the same location is clearly incompatible with the Act.

35. Moreover, even if the Commission were to do as some CLECs suggest and to establish a "floor" for measurement plans, but no "ceiling," this does nothing to solve the problem. The *Notice* proposes twelve measurements. If these twelve measurements were adopted as a mandatory floor, then the range of potential measurement categories to which ILECs would be subjected would only be reduced by twelve (*i.e.*, from 0 to 10,000) in the current environment to twelve to ten thousand, (if a federal floor were set). This range of requirements would still have too much variance to be appropriate to implement a single statutory standard, the requirement of non-discrimination.

36. Some State Commissions have raised the point that it may be appropriate for a performance plan to vary from state to state based on conditions that are specific to each state.[31] In theory, this point is well taken. Practically speaking, however, it is unlikely that a difference of thousands of measurements in the plans ordered by two different states can be attributed to legitimate differences in the conditions in those states. Instead, a difference of that magnitude is almost certainly not the result of identifying state specific issues. Further, these differences can not be resolved without the application of a single regulatory framework based on the consistent application of policy.

37. If a regulatory body follows the path suggested by the *Notice*, and focuses only on a core set of metrics that affect CLECs and the service they provide to their customers, this leads

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30 47 U.S.C. § 251(c).

31 *See*, *e.g.*, Comments of the Virginia State Corporation Commission Staff at 2.

to a relatively small list of measurements. If one accepts the argument that CLECs have made to a number of State Commissions, that the measurement plan should be so expansive that it would capture and isolate virtually every type of potential CLEC activity (even those types that are likely to occur in very small volume, if at all), then the unavoidable result is a plan with thousands of measurements or submeasurements. BellSouth submits that it is simply not possible for two such fundamentally different philosophical approaches to measurements (and two such widely disparate results) to both be compatible with the requirements of the Act. If, however, the Commission does not act to establish a national standard, then the current "crazy-quilt"[32] of disparate measures will continue to exist.

38. The current situation includes not only disparate measurements, but disparate standards as well. There is no reason that set (*i.e.*, objective) standards should vary from state to state. This Commission has already determined that the principal test of the nondiscrimination requirement is parity, *i.e.*, whether the ILEC provides to the CLEC the same quality of service that it provides for analogous retail functions. The application of this standard will necessarily result in different requirements from state to state, but in every instance, the result will be non-discriminatory treatment for CLECs. Thus, for example, in a mountainous, rural state, service provisioning intervals may be generally quite long. The parity standard, however, would require that these intervals be comparable for ILECs and CLECs. In a more urban state (or one with fewer geographic impediments to network provisioning) the intervals might be much shorter), but again, they would be the same for both the ILEC and CLEC. Thus, the parity standard will, in effect, self-correct to take local conditions into account. This is one of the most compelling reasons that a retail analog should be used whenever one exists.

[32] Covad Comments at 18. Although the choice of words is Covad's, Covad argues only for the imposition of minimum standards, which for the reasons explained herein, will not adequately address the problem.

39. When a retail analog does not exist, then, as this Commission has previously determined, the ILEC must provide the CLEC service at a level that allows an efficient competitor a meaningful opportunity to compete. Certainly this standard has been difficult to set, which is to be expected, given the inherent problem of determining what will allow a meaningful opportunity to compete when one cannot ascertain what is meaningful by making a comparison to an ILEC functionality.[33] It is most likely this inherent difficulty that has caused benchmarks and intervals in state-ordered plans to vary so much from state to state. However, this should not be the case.

40. If a single regulatory entity were to consider the performance of an ILEC's ordering systems in three locations, there would be no basis for that regulator to determine that a reasonable opportunity to compete requires an eighty-five percent benchmark in one location, a ninety percent benchmark in a second, and a ninety-eight percent benchmark in a third. This, however, is exactly the outcome that has occurred when the standard is determined in different states by different state regulators. This is not a criticism of the states, because each Commission has unquestionably used its best judgment to identify the appropriate standard. The fact remains, however, that these varying decisions are not made on the basis of any state specific factor, but simply are the result of independent decision making processes that happen to have produced differing standards. Again, under the Act, there is no justification for a decision that a "meaningful opportunity to compete," which is intended to be an objective standard, should vary from place to place. The only way that these inconsistencies can be eliminated is if this Commission sets a national plan, with standards of this sort set on a national basis.

41. The second reason that a national plan is necessary is that it is the only effective means to accomplish the of the *Notice's* stated goal of streamlining plans to reduce the

[33] This difficulty is another reason that a parity standard should continue to be used to determine nondiscriminatory treatment in any instance in which a retail analog is available.

regulatory burdens on the ILECs. As established by the various ILECs in their comments, developing, implementing and sustaining performance measurement plans require a great deal of money and labor. The CLECs generally responded to this reality by either brazenly claiming that no burden placed upon the ILECs can ever be too great,[34] or by engaging in the fantasy that systemic changes are simple or easy and, therefore, not a burden.[35] The first contention, that burdens should be placed upon the ILECs without limit, is so ridiculous that it really requires no response. The second contention, that measurement reporting systems can be readily changed, is just wrong.

42. A modification to any measurement is a methodical process that requires the efforts of subject matter experts, business analysts, programmers, developers and database analysts, as well as personnel dedicated to quality control. To be specific, a single measurement change involves each of the following steps:

1) Conversion of requirements into general business rules and source system identification, including,

    (a) A determination of the changes required in the detailed documentation of the measurements. In BellSouth this documentation includes the Service Quality Measurement Plan (SQM);

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[34] For example, McLeodUSA contends that "any complaint by ILECs about the burdens of complying with disparate state and federal performance requirements should be summarily dismissed by the FCC". McLeodUSA Comments at 9. See also AT&T Comments at 40, "Even if the imposition of regulatory plans could be viewed as a burden, it is a burden that Congress inherently mandated until local competition is firmly established." Allegiance Comments at 3, "These regulations are *supposed* to be a burden to ILECs because they are designed to ensure efficient and sustained entry that should logically result in the diminution of ILEC market power."

[35] For example, AT&T claims that "performance measures and standards are not burdensome. Data collection is mostly automated, as is the processing and reporting of performance date." AT&T Comments at 39.

(b) Research and documentation necessary to produce the high-level framework for the changes in the measurement. This step includes a description of the revision, the intent of the measurement and a description of the output required;

(c) The handoff to the organization that will refine the framework into the technical specifications for changes in the measurement.

2) Development of a preliminary measurement design document, including,

(a) Complete identification of the sources of the input database, table, field and data value;

(b) Detailed description and application of business rule(s);

(c) Detailed description of output requirements;

(d) Coordination of development requirements and the Coding design;

(e) Reconciliation between Design Requirements and Coding Requirements.

3) Code development and initial testing, which includes:

(a) Review and an initial mapping of requirements for the revised measurement into the programs, data base routines and other recurring processes that are used each month to produce the results;

(b) Coding and test process run to ensure that the data inputs are accurately captured, that the business rules are coded properly and that any outputs(s) used as an intermediate step in the monthly production process are accurate;

(c) Application of code production process and testing for expected output and validation of records inclusion and exclusion.

4) Output and presentation development, including

(a) Review of initial design requirements and mapping into the existing production processing;

(b) Coding and test process with test or actual data;

(c) Application of intermediate or raw data to production process.

5) Integration testing for potential impact on existing production outputs.

6) Performance assurance plan development and testing

(a) Review and initial mapping of requirements into the production process;

(b) Coding and testing process with test or actual data;

(c) Application of intermediate or raw data to production process with output estimates for evaluation of potential impact on payments.

43. The amount of time required for each measurement change depends on the complexity of the change. However, this effort typically requires anywhere from 45 to 270 days for the total process.[36] This process becomes almost an unsustainable burden when it requires multiple changes to comply with multiple state performance plans. In BellSouth's experience, all changes to measurements can and do have an enormous impact on the ILEC reporting infrastructure. The CLECs contentions to the contrary notwithstanding, the burden involved in making systemic changes to accommodate differences from one State plan to the next are both real and considerable. For example, as of early 2000, BellSouth had already invested over $60 million dollars in the systems and programming required to produce monthly performance data. The present cumulative cost would be significantly higher.

44. It is obvious that one cannot reduce the burdens on the ILECs, nor streamline performance plans, by adding measurements. Instead, the additional reporting and implementation associated with additional measurements simply increases exponentially the

[36] In this analysis, one day equals eight hours of labor.

degree of burden involved in administering performance plans. Moreover, these burdens do not devolve solely to ILECs, but pass to regulators as well.[37]

45. Finally, as BellSouth stated in its Comments, the current state-ordered performance plans are going largely unused.[38] As BellSouth noted therein, almost 40% of the sub-metrics in the Georgia plan reflect no CLEC activity for a five month period. Moreover in 2001, even when CLECs did have activity captured by the performance measurement plan, they frequently cared so little about this activity that they did not bother to monitor the performance they received. BellSouth's Performance Measurements Analysis Platform (PMAP) is the primary method used to distribute performance measurements results to CLECs in BellSouth's region.

46. When performance measurements results were posted for the months of January to November 2001, only 12% of the CLECs operating in BellSouth's region signed on to PMAP. Furthermore, during this period, less than 8% of the CLECs operating in BellSouth's region accessed 10 reports or more, even though there are in excess of 300 reports available on PMAP. This can only mean one of two things: 1) the CLECs have only minimal interest in performance measures generally; 2) there are, as BellSouth contends, only a small number of core measurements that are meaningful and necessary. Thus, CLECs may well access only this small core group, while the vast majority of measures in place go unused.

47. The CLECs' contentions notwithstanding, the process by which a plan is modified to accommodate differing state orders is extremely labor intensive and very costly. Having to repeatedly undergo this process creates a tremendous burden for the ILECs that, considering the extent to which the plans are utilized, serves no real purpose. This fact, considered in

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[37] The specifics of the labor required by regulators involved in report monitoring are discussed below, pages 26-27.

[38] BellSouth Comments at 13-14.

conjunction with the legal problems that arise from allowing grossly disparate plans in the states, demonstrates the need for an exclusive, legally binding national plan.

V. THE CLEC PROPOSALS TO INCREASE MEASUREMENTS MUST BE REJECTED.

48. Generally, the CLEC proposals fall into two categories: 1) some CLECs propose that the Commission establish performance measurements, standards, disaggregation and business rules that would serve as a floor below which states would not be allowed to go. Under this proposal, states would be allowed to add whatever they deemed appropriate to this floor.[39] 2) Other CLECs recommend that state-ordered measurement plans be left in place and that federal measurements be layered over the existing plans.[40] Both approaches must be rejected.

49. Under the first-described CLEC proposal, the national plan would function only to establish a lower limit on the number and variety of requirements that states may impose. A state would be free to add to this "floor" in literally any way that it deems appropriate. The first reason that this proposal must be rejected is that it fails entirely to address the legal and practical problems (described above) that relate to the current disparity in state-ordered plans. As stated previously, if a modest floor (along the lines of the measurement plan set forth in the *Notice*) were established, but no further action were taken, this would not only leave in place the expansive state plans that contain thousands of measurements, but would also allow states to order additional measurements without limitation. Thus, the unacceptable inconsistency from

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[39] See, *e.g.*, Allegiance Comments at 7-9.

[40] For example, WorldCom states that the federal plan should be a floor. WorldCom Comments at 9. However, WorldCom also asserts that the states should be allowed "to determine for themselves what is needed for local competition in their states, and ensure that those needs are met." *Id*. at 5. Thus, WorldCom appears to propose that the Commission set a national plan that would overlay all existing state plans.

state to state would continue. Further, the more reasonable the floor (*i.e.*, the less numerous the measurements), the greater the potential range of disparity from state to state, and the greater the potential that inconsistent state-ordered plans and standards can undermine the purposes of the Act. This reason, standing alone, is sufficient to require rejection of this CLEC proposal.

50. This proposal, however, should also be rejected because it would require the Commission to take preemptive action under circumstances that do not justify this action. To understand the CLEC proposal, it first must be understood that these CLECs are, in fact, requesting that the Commission take mandatory action that would preempt any contrary state action. Some CLECs readily admit this in their Comments.[41] Others CLECs are less direct. Either way, the fact is that establishing a floor below which State plans cannot go requires the (at least partial) pre-emption of any plan less rigorous than the floor allows. This would constitute a substantial imposition on the States, without the concomitant benefits that full preemption would provide. For example, if this Commission were to order the thirty six measurements that WorldCom proposes, then any state that did not have these measurements would have to add them, including states in whose performance measurement proceedings WorldCom had proposed the exact same measurements, and which have rejected them. Further, as will be discussed in greater detail later, WorldCom proposes such an extreme degree of disaggregation that its 36 measures would be divided into 4,352 sub-measures. Thus, establishing this plan as a floor would require almost every State Commission that has ordered a plan to modify that plan, in many cases doubling or tripling the present number of required sub-metrics.

51. There is, however, no legally sustainable basis to support preemption to establish

[41] "[T]he federal rule should preempt any state performance standard that is less exacting than the federal rule." Allegiance Comments at 9.

a floor as the CLECs request. Again, ordering a national plan that would replace state plans would only be appropriate if the Commission finds that, in the absence of this action, the purposes of the Act will not be served. For the CLECs that propose preemption to set a floor to meet their legal burden, they must demonstrate that, absent a floor, the state plans are insufficient to promote the goals of the Acts. *i.e.*, that they do not require enough. The collective CLEC Comments fail entirely to meet this standard.

52. First, the CLECs generally argue for more measurements (both the CLECs that argue for a floor, and those that argue for an overlay of federal measures) by making random allegations of anecdotal problems they have encountered while attempting to order UNEs or resale from ILECs. In some instances, these complaints are so vague that it is difficult to discern the specific practice and carrier about which a particular CLEC complains.[42] In other instances, the allegations relate to ILECs other than BellSouth, and to matters of which BellSouth has no knowledge. In the instances in which the allegations appear related to BellSouth, however, BellSouth is aware that the anecdotal complaints either misrepresent the facts, or the situation does not present the sort of systemic problem that needs to be addressed by the implementation of a national plan.[43] Although a national plan is needed, ordering a plan—in the form of a national floor, or otherwise—should not be done lightly, and should certainly not be done on the basis of anecdotal complaints.

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[42] See, *e.g.*, Adelphia Comments at 4; Business Telecom Comments at 13.

[43] For example, WorldCom contends that because of change management issues, it devotes four times more Information Technology ("IT") resources to BellSouth in Georgia than to any other state in the country. (WorldCom Comments at 13). This contention is nonsensical. WorldCom competes throughout BellSouth's region. The same BellSouth systems are used throughout BellSouth's region and a single change control process applies to these systems. Thus, it makes no sense for WorldCom to devote four times as much labor to change management in Georgia as to the other States in BellSouth's region that utilize the exact same system.

53. Moreover, even if the CLECs' allegations of service problems were absolutely accurate (a premise that BellSouth believes is unlikely), this still would provide no basis to set a preemptive floor. Although not every state in the country has implemented a plan, even the CLECs admit that virtually every state in the country has begun the process of plan development.[44] If the CLECs are to make a successful argument for the establishment of a preemptive floor, then they must do so by proving that these state plans are insufficient to serve the purposes of the Act, without the imposition of this floor. Even if we assume that the CLECs anecdotal allegations of service problems are true, the CLECs have presented absolutely no basis to conclude that the state plans have failed to detect the service problems, or to assess fines in appropriate circumstances.

54. The Commission would only be justified in preempting the States to the extent necessary to set a minimum standard if it found the state efforts to be lacking. The CLECs have not only not made this case, they have not even attempted to do so. In general, the CLECS have made favorable comments about the state plans and have stated that they are in favor of keeping the state plans in place.[45]

55. Generally speaking, the CLECs want to add federal measurements (to apply as a floor or an overlay) simply because they would prefer to have more measurements. The CLEC position is predictable, but hardly compelling. To the extent a plan is ordered, the expense and labor necessary to implement and administer that plan on an ongoing basis falls largely on the ILEC, although regulators that have received the reams of paper necessary to report on the plans that have been ordered to date, also understand that performance plans are labor intensive for

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[44] See WorldCom Comments at 2; Appendix A.

[45] *See*, AT&T Comments at 13-15; WorldCom Comments at 4-6; McLeodUSA Comments at 6.

regulators as well. The only group of entities that typically have no responsibility under performance plans are CLECs. Given this, it is understandable that CLECs would want additional measurements. This desire on the part of CLECs, however, is not enough. Absent a demonstration that a floor is necessary to render State plans adequate to implement the non-discrimination requirements of the Act, there is no legally sustainable reason to pre-empt the States (even partially) to put this floor in place.

56. From a policy perspective, the argument of some CLECs that there should be a national floor, although inadequately unsupported, could be justified in other circumstances. The position of other CLECs, however, that the Commission should simply layer upon the existing state plans an additional federal plan makes no sense under any scenario. First of all, under the latter approach, the state plans would be left in effect, and the current disparity in measurement plans (explained previously) would remain. Further, in all likelihood, the disparities would grow even greater as states are left to add additional measurements on any basis they deem appropriate. This reason, standing alone, is sufficient to require rejection of the CLEC demand for the overlay of a federal plan. This proposal should also be rejected for a myriad of other reasons.

57. Considered, in toto the CLECs' demands for a federal overlay are supported only by a great deal of vague rhetoric to the effect that measurements will prevent ILEC discrimination, so the more measurements, the better. BellSouth believes that the CLECs' real goal in requesting a federal measurement plan is simply to lay the groundwork for a federal penalty plan. As will be discussed later, the CLEC desire for massive, unwarranted penalties appears to know no bounds, and most CLECs no doubt understand that their arguments for a

federal enforcement mechanism would be substantially undercut by the lack of a federal measurement plan to enforce. In terms of the stated reasons for adding a federal plan to the state plans already in existence, the CLECs offer little. The CLECs also fail to address, or even acknowledge, the tremendous administrative and other problems that an overlay of measurements would cause.

58. As BellSouth noted in its Comments, many of the measurements proposed in the *Notice* have been adopted in some form in the States in BellSouth's region that have ordered plans.[46] Likewise, the substantially greater list of measurements proposed by WorldCom is, in many instances, based on state plans.[47] Thus, under the best case scenario, an overlay of measurements would result in federal measurements that duplicate State measurements precisely. The scenario would result in an unjustified duplication of measurements, systems, reports and, perhaps, penalties. The almost certain alternative, however, would be even worse.

59. Setting a national plan that would overlay state plans would necessarily require the Commission to embark on the process of refining the measurements by setting standards, determining the correct degree of disaggregation, and formulating necessary business rules. Just as these elements of current measurement plans vary from state to state, any decisions on these plan elements made by the Commission would differ from at least some of the pre-existing state decisions. Thus, an overlay would give rise to the almost certain prospect of having state and federal penalties that duplicate one another in what they measure, but that would differ in the way that the measurements function. Given the variables in setting each measure, including such

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[46] BellSouth Comments at 25.

[47] WorldCom Comments at 10, "WorldCom's proposed metrics . . . are a subset of the performance measurements adopted in the states and represent the 'best of the best' state performance measurements."

elements as standards, exclusions and disaggregation, it is certain that the federal plan would differ from most, if not all, state plans over which it is layered. As stated previously, the present degree of disparity between State plans is legally and practically untenable. An overlay of federal measurements would increase the disparity, and the resulting logistical nightmares exponentially.

60. The CLECs are largely, and notably, silent on the issue of who would administer this quagmire of conflicting measurements, rules and standards. Would each state have responsibility to administer both its own and the federal plan? Would this Commission administer a 50 state plan as if the conflicting state plans do not exist? The CLECs almost uniformly fail to address these issues.

61. The CLECs also blithely ignore the regulatory labor involved in administering any plan, and the substantially greater labor involved in administering the duplicate state and federal plans they propose. Each month, BellSouth files performance measurements reports with the Georgia and Louisiana Public Service Commissions. The Georgia monthly filing consists of 341 reports. For Louisiana, 808 reports are filed each month. The large volume of reports is due to the fact that a single measurement may occupy multiple pages due to the product and volume disaggregation, time distribution intervals and other data that are required by the specific definition of the measurement.

62. Under a federal plan of the sort proposed by the CLECs, the volume of reports would increase exponentially. As an example, consider the 12 measurements proposed by the Commission in the *Notice*. Each of these measurements would presumably have some disaggregation for product, method of order submission (such as non mechanized or mechanized) and type of activity (such as dispatch and non-dispatch). Assume that for each of

the 12 measurements proposed in the *Notice*, there is an average of 10 sub-metrics resulting from disaggregation. The result would be 120 submeasurements reported each month for each ILEC in each state. If the Commission were to monitor the results of each state in the nation, there would be 6,000 reports (120 x 50) to review each month. Moreover, this figure makes the unrealistically conservative assumption that only one ILEC does business in each state.

63. WorldCom has proposed a measurement plan that consists of 4,352 submetrics when disaggregated according to the detailed description of the measurements included with WorldCom's Comments. If a plan as outlandish as this were to be reported for each of the 50 states, the Commission would be faced with the prospect of evaluating 217,600 measurements each month. This also assumes (unrealistically) that only one ILEC provides service in each state. If the number of CLECs actually providing service in each State were considered, the amount of required reporting would increase exponentially.

64. The concept of Congressional delegation to the Commission of the power to make rules, which was fundamental to the Court's decision in *Iowa Utilities Board*, is based on the idea that when the Commission makes rules, conflicting state rules cannot be maintained. Consistent with this concept, every decision that the Commission has made to implement the Act has reflected great care in determining the extent to which the Commission and the States would participate to define the rules that apply to that area. The Commission has never done what some CLECs insist upon in this proceeding: allowing the states to make any rules they see fit concerning performance plans, overlaying these disparate rules with conflicting federal rules and leaving the industry to somehow sort out the result. This suggestion must be rejected.

65. Some CLECs contend that there is precedent for this proposed mishmash of state and federal regulation. These parties are flatly wrong. Two areas that CLECs erroneously identify as having been resolved by way of a comparable process are UNEs and collocation.[48]

66. In the UNE Order, the Commission utilized its authority to determine which UNEs must be offered by ILECs by issuing a specific list.[49] The Commission also stated that States could add UNEs as long as "they meet the requirements of Section 251 and the national policy framework instituted in [the] Order."[50] Moreover, the Commission ruled that States could add elements to the national list only by applying the principles codified in Section 51.317 (the necessary and impair standards).[51] In other words, the Commission made most of the decisions regarding the appropriate UNEs to be offered, and allowed the States only the ability to add to these decisions through the application of very specific, Commission-determined criteria.

67. Likewise, the Commission's actions in the collocation proceeding defined the process for setting the applicable intervals in a similarly exact manner. In that case, the Commission reiterated the need for national collocation standards, and determined to modify these standards "to include provisioning interval requirements for physical collocation."[52] The Commission, however, decided that these standards would apply only in states that do not choose to set their own standards "by statute, through an existing or future rulemaking order, by enforcing a state tariff, or by applying the precedent of a state arbitration decision,"[53] and if the

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48 ALTS Comments at 13; XO Communications Comments at 18.

49 *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking,* 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*").

50 *Id*. at 3767, ¶ *154.*

51 *Id., ¶ 155.*

52 *Collocation Interval Order*, 15 FCC Rcd at 17816, ¶ 17.

53 *Id*. at 17819, ¶ 22.

incumbent and the requesting carrier have not agreed to an interval. In other words, the Commission adopted a set of intervals that states could implement if they choose to do so, rather than to set their own rules.

68. The point is that, in both the collocation and UNE Orders, the Commission carefully crafted a framework for making the necessary decisions in the subject area at issue. These cases in no way involved the duplicative application of state and federal rules that the CLECs advocate. The CLECs' proposal for the almost random application of federal and state plans without any harmonization or coordination is an invitation to create a regulatory bedlam that is both unprecedented (for good reason) and completely impractical. This proposal must be rejected.

VI. A POSSIBLE COMPROMISE

69. A number of State Commissions have stated the belief that it is appropriate for measurements or standards to vary from state to state based on state-specific factors. This contention has a certain intuitive appeal. However, as stated previously, the experience of the past several years has led BellSouth to believe that, unfortunately, most differences between state plans do not relate to state specific factors. Instead, these differences reflect a randomness that results from different, entirely independent regulators applying their discretion to a comparable situation to determine what is appropriate, and doing so without the benefit of specific guiding principles, such as would be found in model rules.

70. Allowing measurements to differ from one state to the next might be appropriate, but only if there are real differences, differences that can be demonstrated. Likewise, there may be circumstances in which business rules need to vary from state to state due to local circumstances, or based on differences from one ILEC to another. This does not, however,

justify in any sense the tremendous disparity in State plans that now exist, and it certainly does not justify an overlay of a federal plan upon the disparate state plans. Instead, if the Commission were inclined to allow appropriate variations in plans from state to state, it should do so (as it has done in other areas) by allowing these variations only in very specific, defined instances.

71. For example, the Commission could order a set of national measurements that would apply in every state, but allow State Commissions to add to these measurements based upon criteria that would be determined by this Commission and codified. Likewise, it would be appropriate for the Commission to allow State Commissions to order differing business rules or levels of disaggregation under specific circumstances, which the Commission would define in advance. Under this approach, there should be no variation from state to state in measurements, rules, or otherwise without some demonstrated need. This need could be demonstrated by a local history of systemic discrimination by an ILEC, or it could be based upon appropriate local conditions, but it would have to be based on something other than the unsubstantiated claims of CLECs that additional measures should be added. This approach would necessarily result in only slight variations from state to state in measurements and standards, and the business rules would vary only when the variation is demonstrably necessary to meet the objectives of the Act.

VII. THE CLECs HAVE PROPOSED MEASUREMENTS THAT SHOULD NOT BE INCLUDED IN A NATIONAL PLAN

72. As stated previously, BellSouth believes that the Commission should first determine the direction that this proceeding will take, then utilize the framework of that determination in further proceedings. Consistent with this, BellSouth believes that it is premature to consider specific proposals by the parties relating to measurements. Instead, the Commission can only determine which measurements are appropriate after it has determined

whether there will be a national plan, and if so, whether it will be legally binding on the states, or a model plan. Nevertheless, a number of parties have proposed specific measurements, standards and business rules in their Comments, many of which go well beyond the measurements proposed in the *Notice*. Therefore, BellSouth has undertaken herein to respond to the specific proposals of some CLECs. WorldCom has advanced the most comprehensive measurement proposal, a proposal in which many other CLECs appear to join. For this reason, BellSouth has focused its response primarily on WorldCom's proposal. Other proposals that very significantly from WorldCom's are also addressed.

A. WorldCom Proposal

73. At the outset, it must be noted that WorldCom has proposed a massive set of measurements. This is masked somewhat by the fact that the WorldCom proposal includes only 36 measurements.[54] WorldCom has made a disaggregation proposal, however, whereby those 36 measurements would be divided into 4,352 submeasurements in each state.[55] What this means from a practical standpoint is that, under WorldCom's proposal, this Commission would create a federal plan that would have thousands of submetrics more than most of the state plans that have been adopted to date, and would simply layer it on top of the state plans. Thus, for example, in Florida, BellSouth would be subject to 70 state-ordered measurements, disaggregated into 2,143 submeasurements. At the same time, BellSouth would be subject in that State to 36 federally-mandated measurements, disaggregated into 4,352 submetrics. Clearly, this degree of

[54] Although WorldCom's proposal includes 29 numbered measurements, many have subparts that are, for all practical purposes, separate measurements. Including these subparts, WorldCom has proposed 36 measurements.

[55] Attached hereto (as "Attachment A") is the detailed breakdown of the submetrics that result from WorldCom's proposed disaggregation, as well as a comparable breakdown of the proposals of Covad and Allegiance.

disaggregation is unworkable, even if contained in a plan that would be the only plan in effect. WorldCom's proposal to layer more than 4,000 submetrics in a federal plan over 2,000 different metrics in a state plan is absurd.

74. The second general area in which WorldCom's proposal is problematic involves standards. WorldCom advocates a wholesale abandonment of the method for discerning discrimination previously set by this Commission, *i.e.*, using a retail analog when one exists. Instead, WorldCom advocates that benchmarks should be utilized in every instance.[56] This proposal is obviously in conflict with this Commission's previous decisions and it should be rejected. Even if WorldCom were correct in its assertion that benchmarks are easier to administer[57], the fact remains that the Act requires nondiscriminatory treatment, and the best way to discern whether ILEC's are meeting this standard is to compare what an ILEC provides to itself to what it provides to the CLEC. The use of benchmarks across the board would abandon this reasonable test, which has proven to be workable, in favor of rigid standards that do not take into account the realities of local conditions, or the service that ILECs provide their retail customers.

75. It is not a coincidence that, while making this proposal, WorldCom also proposes extraordinarily high benchmarks in almost every instance. This stratagem is not new. In state proceedings in BellSouth's region, WorldCom proposed benchmarks to be set at a 100 percent (*i.e.*, perfection) for almost a third of the measurements that had benchmarks.[58] This proposal

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56 WorldCom Comments at 17.

57 *Id*.

58 For example, in the Alabama proceeding *In Re: Petition for Approval of A Statement of Generally Available Terms and Conditions Pursuant to Section 252(f) of the Telecommunications Act of 1996 and Notification of Intention To File a Petition for In-Region InterLATA Authority with the FCC pursuant to Section 271 of the Telecommunications Act of 1996*, Docket No. 25835, WorldCom's witness, Karen Kinard, testified on July 31, 2001 that

was uniformly rejected. Although WorldCom has retrenched slightly from the contention that the appropriate standard is perfection, it has retrenched very little. WorldCom's proposal to have benchmarks for every measurements is clearly inappropriate, and the extremely high benchmarks that it proposes are inappropriate, even in the instances when a benchmark is otherwise indicated.

76. Further, as stated previously, the applicable standard is nondiscrimination. WorldCom's avoidance of the best test of comparable treatment (the use of a retail analog), coupled with its extremely high proposed benchmarks can only mean one thing: WorldCom does not seek nondiscriminatory service, but rather superior service. Although WorldCom disingenuously argues that benchmarks are "easier", its real goal is to impose on ILECs a standard that is in excess of the legal requirement of the Act to provide nondiscriminatory service. WorldCom's ploy must not succeed.

77. Again, WorldCom has proposed 36 measurements. Of these, 12 correspond at least generally to the 12 measurements proposed in the *Notice*.[59] The remaining WorldCom – proposed measurements would be additions to those proposed in the *Notice.* BellSouth opposes the inclusion of these measurements in a national plan because they are not core measurements that relate to key areas that affect customers. Still, many of these additional measurements correspond, to some degree, to measurements that BellSouth is currently providing under state-ordered plans. Therefore, BellSouth addresses in some cases what it believes would be a better

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WorldCom's plan had 50 measurements for which benchmarks were proposed and that WorldCom proposed a 100% benchmark for 13 of these 50. Transcript, Vol. VIII-A, p. 4882.

[59] The 12 corresponding WorldCom-proposed measurements are 2(a) Query Response Timeliness, 8. Percent On-Time LSRC/FOC, 9. Percent On-Time Reject Notices, 10. Percent Jeopardy Notices, 11. Percent On-Time Completion Notices, 13. Average Completion Interval, 14. Percent Orders Completed on Time, 17. Percentage of Orders Held 5,15,30 Days, 18. Troubles Within 30 Days of Install/Order Activity, 19. Mean Time to Restore, 20. Trouble Report Rate, and 21. Percent Repeat Troubles.

alternative to the WorldCom-proposed measures, if the Commission were inclined to add these measurements to the core set.

78. Further, almost all of the WorldCom-proposed measurements that correspond to those in the *Notice* should be rejected because they incorporate the wrong standard (a benchmark when a retail analog exists), have an unreasonably high standard, or have proposed business rules and disaggregation that is impractical or unfair. BellSouth also addresses these specific instances below.

79. BellSouth's specific responses to the measurements proposed by WorldCom are as follow:

80. (1) Percent System Availability: BellSouth currently reports this measurement, and the benchmarks and disaggregation proposed by WorldCom are consistent with what BellSouth proposed in its Comments.[60] However, the business rules proposed by WorldCom differ in the determination of when a system is considered to be "down." WorldCom appears to propose that there would be no downtime between 6 AM and midnight. However, the CLECs have had little activity during traditional non-business hours. For example, during the period of Sept – Nov 2001, nearly 94% of CLEC ordering activity in BellSouth's region occurred during the hours of 7am to 9 pm, Eastern Time. Accordingly, BellSouth believes that ILECs should be able to schedule downtime anytime except 7 AM to 9 PM.

81. (2) (a) Query Response Timeliness; (b) Percent Ordering/Pre-ordering System Error/TimeOuts: BellSouth's "Average Response Time and Response Interval (Pre-ordering/Ordering)" measure is essentially the same as the "Query Response Timeliness" measure proposed by WorldCom. However, the disaggregation that WorldCom proposes is

[60] BellSouth Comments at 28-31.

substantially different from that presently reflected in plans implemented in BellSouth's region. BellSouth properly disaggregates this metric by system and contract. Further, disaggregation by query type, as proposed by WorldCom, incorrectly compares different systems.

82. Regarding the measure "Percent Ordering/Pre-Ordering System Error/TimeOuts" proposed by WorldCom, BellSouth does not have a separate measure for timeout. However, timeouts are system dependent and the system treats all requests equally, without regard to the entity originating the request. This measure was proposed in several states in the BellSouth region, but was not adopted by a single State commission that considered it. Finally, since the Commission's intent is to fashion a limited set of key measurements, this particular measurement should not be added because it is secondary to the System Availability metric. While it is very important that the systems is available for the CLECs and the ILECs at the appropriate times, it is much less critical that the response time is 1 second, 3 seconds or even the 10 second interval that WorldCom states is acceptable.

83. (3) (a) Percent Change Management Notices; (b) Average Delay Days: BellSouth currently reports these measures within its region. However, the benchmark of 98% is too high. In most states in BellSouth's region, the standards we adopted were (1) 95% on time, and (2) average delay less than or equal to eight days.

84. The Average Delay Days measure is largely duplicative of the timeliness measure in that it is simply another way to measure the same event. This is clearly not a key measurement, because the process is adequately covered by a measurement already included.

85. (4) (a) Percent Software Error Correction in X Days; (b) Average Delay Hours/Days: WorldCom proposes a new metric, which relates to correcting software errors. However, because of the testing arrangements BellSouth makes available with any software

update, the errors that this measure is ostensibly designed to capture are identified before the software is loaded. Further, the change management process is more suitable for establishing methods and procedures for software updates, and participation in that process would eliminate the need for this proposed measure. To date, no State commission in BellSouth's region has ordered this measurement.

86. The benchmarks that WorldCom proposes, 98% cleared in 24 hours for problems without workarounds and 98% in 72 hours for problems with workarounds, are unreasonable. If this measurement were adopted, a more reasonable benchmark is 90% cleared in 10, 90 or 120 days depending upon whether the errors are high, medium or low impact, respectively. Finally, this measurement cannot be reasonably considered a critical component of a core measurements set for national application.

87. (5) CLEC Center Responses in X Days: WorldCom proposes that ILECs be required to create a database, like one apparently maintained by Verizon in New York, "to cover problems impeding the ordering process, such as rejections that the CLEC is not given enough information to correct database inaccuracies that impede placing an accurate order and missing notifier issues."[61] The ILEC would be required to monitor the time the request came in and an answer went out. There are at least two problems with this approach. First, performance measures are designed to monitor an ILEC's performance to ensure the CLECs are being provided nondiscriminatory access under existing methods and processes. The purpose of measures is not to require the creation of new methods and processes (such as a new database) as this proposed measure would apparently require. Second, even if BellSouth and other ILECs were to create such a database, there are so many variables that would affect the measure that it

[61] WorldCom Comments at 39.

would be practically useless. These variables include: CLEC training and expertise, objective judgment on the quality of response (stop time); CLEC familiarity with online tools; and CLEC participation in training/workshops.

88. The CLEC Centers and CLEC Support Centers/Help Desks consist of over 1,900 employees with different functions and in different states. Each of these people handles multiple CLECs, as well as multiple states. Based on the proposed disaggregation for this measurement, which calls for CLEC and state specificity, the employee answering a call would have to separate the call receipt data for the centers by the relevant CLEC and the relevant state. An ILEC service representative's primary function is to complete service orders that are submitted by CLECs. While the service representatives are more than willing to answer CLEC questions through the LCSC, they should not be put in the position of having to spend valuable time classifying every question or request into a database, which would be the result if these proposed measures were adopted.

89. This measurement is not a key measurement. Moreover, the burdens associated with the creation of the process and centralized database to implement this measurement clearly outweigh any benefit that would be gained. Significantly, this measurement has been proposed in numerous State commission hearings within BellSouth's region and no State commission has adopted this measurement. In rejecting a nearly identical measurement proposed by WorldCom in Florida, the Florida Public Service Commission stated: "We agree this measurement would be labor intensive to capture."[62]

90. (6**)** Percent Order Accuracy: In its Comments filed January 22, 2002, BellSouth

[62] Florida Public Service Commission Order No. PSC-01-1819-FOF-TP, Docket 000121-TP, Issued September 10, 2001, at 22 ("*Florida Order*").

proposed a measurement of Service Order Accuracy (SOA), which was described fully in Attachment 1 of that filing. The SOA measurement that BellSouth proposed is essentially the same as the Percent Order Accuracy measure proposed by WorldCom. However, WorldCom proposes a benchmark of either 98% accurate or 95% accurate, depending on whether one refers to WorldCom's comments or to the detailed measurement page in Appendix B. Every State commissions that considered this measurement in BellSouth's region found a benchmark of 95% accurate to be appropriate.

91. WorldCom also proposes too great a degree of disaggregation. For directory listings, BellSouth compares the request to the final order. The ordering centers are regional, and a manual report is prepared based on a statistically valid sample of all orders issued in a month. Further, from the standpoint of specific CLECs, if there are errors in the process, many of these errors would be captured by the Percent Provisioning Troubles within 30 Days of a Service Order Completion proposed in this Notice.

92. (7) Percent Flow Through: BellSouth currently reports flow through results that measure both total flow through ("Percent Achieved Flow Through") and orders designed to flow through ("Percent Flow-Through Service Requests"). However, the benchmarks proposed for these metrics by WorldCom are inappropriately high. Moreover, Flow Through is not a key measurement.

93. The Commission has recognized in recent orders that CLEC orders "flow-through" if two things occur: (1) the orders are submitted electronically, and (2) the orders pass through an ILEC's ordering OSS into its backend systems without manual intervention.[63] While

[63] See *In the Matter of Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*,

the Commission has considered the level of order "flow-through" as a potential indicator of a wide range of problems in its determination of whether an ILEC provides nondiscriminatory access to its OSS, the Commission consistently expresses the opinion that flow-through rates are not the sole indicium of parity. As the Commission stated in the Texas 271 Order:

> We have not considered flow-though rates as the sole indicia of parity, however, and thus have not limited our analysis of a BOC's ordering processes to a review of its flow-through performance data. Instead, we have held that factors such as a BOC's overall ability to return timely order confirmation and rejection notices, accurately process manually handled orders, and scale its systems are relevant and probative for analyzing a BOC's ability to provide access to its ordering functions in a nondiscriminatory manner.[64]

94. Further, even if the measure were needed, in the form proposed by WorldCom, the measurement completely ignores the effect of orders submitted by the CLEC that are rejected due to CLEC errors.

95. (8) Percent On-Time LSRC/FOC: BellSouth agrees that this is a critical measurement. In its Comments, BellSouth proposed the Firm Order Confirmation (FOC) Timeliness metric that measures the time from the receipt of a valid Service Request at the OSS gateway to the time the FOC leaves the OSS gateway and is transmitted to the competing carrier.[65] BellSouth's proposed measure is similar to measurements that are utilized by other RBOCs, and the one advocated by the Local Carrier User's Group (LCUG) of which WorldCom is a member. WorldCom, however, would apparently have BellSouth and other ILECs throw

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CC Docket No. 00-217, *Memorandum Opinion and Order*, 16 FCC Rcd 6237, 6305 n.397 (2001).

[64] In the Matter of Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas, CC Docket No. 00-65, *Memorandum Opinion and Order*, 15 FCC Rcd 18354, 18444, ¶ 179 (2000).

[65] BellSouth Comments at 32-33, ¶ 75.

out a measurement that is in place, currently working, and that the CLECs initially proposed. WorldCom would then replace the FOC timeliness measure with a new metric that measures the speed of returning a FOC by a different yardstick. Also, WorldCom suggests that if the beginning or ending time stamp data is not available, the "On Time" designation should be automatically considered a miss. This approach is unreasonable. An ILEC processes hundreds of thousands of CLEC requests each month. Missing a beginning or ending time stamp provides no basis to conclude automatically that the ILEC provided discriminatory access to its OSS.

96. BellSouth does not agree with WorldCom's proposal that the ILEC perform a facilities check prior to providing a FOC. In effect, WorldCom is not raising a measurement issue, but is instead, demand that the underlying process be changed. As discussed previously, the purpose of measurement plans is not to force the creation of new methods and processes. Further, while there is no BellSouth retail process completely comparable to the return of a FOC, certain aspects of BellSouth's ordering process and the CLEC ordering process have similarities. BellSouth does not perform a facilities check during its retail ordering process. Thus, WorldCom would, in effect, require that BellSouth to provide a wholesale process that is superior to that provided as a retail process.

97. (9) Percent On-Time Reject Notices: BellSouth agrees that this is a critical measure area and should be included in any national performance measurements plan adopted. BellSouth proposed the Reject Interval metric in its January 22, 2002 Comments in this proceeding and believes that it is the appropriate measure to adopt.[66] BellSouth's proposed measure is similar to measurements utilized by other RBOCs, and previously proposed by LCUG. WorldCom, however, again proposes a totally different measurement. As with the

[66] BellSouth Comments at 33, ¶ 76.

previously-discussed measurement Percent On-Time LSRC/FOC, WorldCom would have the ILECs discard a measurement that is in place, currently working, and that the CLECs initially proposed, and replace it with a new measurement that measures the speed of returning a reject notice in a different way. This is simply an unnecessary waste of resources that would provide no benefit.

98. (10) Percent Jeopardy Notices: In its Comments, BellSouth expressed the opinion that the measurement proposed in the Notice, which tracks the percentage of orders with missed due dates that are given advance notice, is adequate and appropriate.[67] BellSouth currently produces this information in the form of the Average Jeopardy Notice Interval and Percentage of Orders Given Jeopardy Notices measurement. Once again, WorldCom proposes to discard an existing measurement that the CLECs requested in numerous proceedings and redefine it to measure the same process in a different way.

99. The measurement proposed by WorldCom is both confusing and fraught with potential problems. This measure appears to be a hybrid of the percent jeopardies measurement and the jeopardy notice interval measurement. It expresses the number of jeopardy notices sent within three separate time intervals as a percentage of missed due dates. There are no exclusions for the number of due dates missed for CLEC reasons or end-user reasons, such as no access. Finally, the proposed standard is a benchmark of 98%. Under this measurement, an ILEC having no jeopardies that required a notice to be sent, but that missed one appointment due to CLEC reasons, would have its performance rated as noncompliant.

100. Lastly, this provisioning measurement provides a very clear example of measurement excess. The disaggregation proposed by WorldCom is 21 products, further

[67] BellSouth Comments at 40, ¶ ¶ 91-92.

disaggregated into dispatch and non dispatch, 3 time intervals, and a geographic disaggregation for provisioning/maintenance regions within a State. WorldCom's Comments also contain a reference to a volume disaggregation based on the number of lines ordered or provisioned.[68] In past proceedings in BellSouth's region, WorldCom has proposed as many as three levels of volume disaggregation. For purposes of illustration, however, BellSouth will assume just two levels of volume disaggregation. Thus, the disaggregation proposed by WorldCom results in 1008 sub-metrics for this single measurement (21 (products) times 2 (dispatch/non-dispatch) times 3 (time intervals), times 4 (geographic regions) times 2 (volume disaggregation)).[69] Although, as stated previously, many CLECs have been quite candid in their refusal to participate in any effort to streamline measurements, there is perhaps no clearer example of a CLEC's resolve to do precisely the opposite.

101. (11) Percent On-Time Completion Notices: WorldCom proposes to include billing notification timeliness as part of this measure. BellSouth agrees that incumbent LECs should measure the amount of time between the actual order completion (when the service is delivered to the end-user) and the distribution of the order completion notice to the competitive carrier. A measure was proposed in BellSouth's Comments for this purpose, the Average Completion Notice Interval measurement.[70] However, BellSouth disagrees with the inclusion of billing notification timeliness as part of this measure because the most appropriate indication of the point at which provisioning ends is when the service ordered is actually delivered to the customer. The billing process does not begin until after the provisioning process is complete.

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[68] WorldCom Comments at 30.

[69] This number is based on the conservative assumption of four geographic categories for each state, three separate geographic regions within the State and one State aggregate.

[70] BellSouth Comments at 37, ¶ 85.

Therefore, billing measurements, such as billing notification timeliness, should not be part of any measure that applies to the provisioning process.

102. WorldCom proposes a benchmark as the standard. A benchmark, however, is not appropriate because a retail analog exists. Finally, WorldCom has, once again, proposed a new measure to replace a measurement used by RBOCs for years, and that is very similar to the measurement originally proposed by CLECs. Further, this new measurement is not necessary because an existing measurement already addresses the timeliness of completion notices.

103. (12) Percent Timely Loss Notification: WorldCom proposes this metric to measure whether an ILEC provides prompt notice to the CLEC that a customer has either returned to the ILEC or moved to another CLEC. The benchmark advocated is 98% within 24 hours of the point in time that the customer migrates to another carrier. BellSouth believes that the issue raised by WorldCom, and embodied by the proposed measurement, does not rise to the level of a critical activity that requires inclusion in any national set of performance measurements. This measurement was proposed in State commission hearings within the BellSouth region, but no State commission considered this proposed measure significant enough to include it in the performance measurements adopted.

104. This measurement appears designed to force ILECs to keep track of the CLEC's customers. No such obligation exists. Thus, the proposed measurement is simply an attempt by WorldCom to force the creation of a new process under the guise of a proposed measurement

105. (13) Average Completion Interval (with dispersion around average): BellSouth proposed in its Comments an Order Completion Interval (OCI) measure, which was defined as a

parity measure, and compares the actual time it takes BellSouth to complete CLEC orders versus its own customers' orders.[71]

106. The BellSouth proposed measurement should be adopted. WorldCom's proposal is yet another attempt to redefine a measurement currently in use, which would waste resources and provide no benefit. WorldCom proposes to measure the time it takes the ILEC to provision a CLEC service request, including the time from when the CLEC submits a valid service request until the order is completed. This measurement includes the FOC Interval and the Order Completion Interval, both of which are existing measurements in many ILEC measurement plans.

107. Also, this measurement addresses two different processes: ordering and provisioning. The Firm Order Confirmation interval does not have an equivalent process in retail, while provisioning does. As a result, the Ordering process should be measured against a benchmark while the provisioning intervals for the CLEC should be compared against the equivalent retail interval. The different processes and the need for different standards of comparison present strong reasons for there to be two different measurements.

108. Every one of the standards proposed by WorldCom are rigid benchmarks. As discussed earlier, this is not appropriate in any instance in which a retail analog exists. Further, the benchmarks proposed by WorldCom for this particular measurement do not make sense when compared to the benchmarks WorldCom also proposes for the % On Time LSRC/FOC. For example, the interval for a Special Access to EELs Migration is 95% in 3 days. This 3 day interval includes the FOC interval and the Order Completion interval, according to the definition of this measurement proposed by WorldCom. Turning to the ordering process, CLECs may use

[71] BellSouth Comments at 48-49, ¶ 111.

a manual ordering process for this migration. In the % On Time LSRC/FOC measurement proposed by WorldCom, the benchmark for a manual order is 95% in 24 business hours, the equivalent of three business days. Since WorldCom proposes 3 days for the ordering and provisioning process, and 3 business days for the ordering portion of this overall process, this would leave no time for provisioning. Thus, WorldCom's measurement proposals contradict one another.

109. (14) Percent Orders Completed on Time: BellSouth stated in its Comments that the Commission should not require ILECs to produce measures such as Percentage on Time Performance that would duplicate other measures, in this case, the Percent Missed Appointment measure. For this reason, BellSouth believes this WorldCom proposed measure is unnecessary.

110. Further, WorldCom has also defined the measure in a way that is problematic. Based on WorldCom's definition, this proposed measure addresses two distinct and different processes: ordering and provisioning. As with Average Completion Interval, WorldCom has inappropriately combined a process for which there is a retail analog with one for which there is no analog. The fact that two different standards should apply makes this combination improper. Further, the use of a benchmark to measure a process for which there is a retail analog is inappropriate. As with average completion interval, WorldCom's proposed benchmark for this measurement is inconsistent with the benchmark it proposes for % on Time LSRC/FOC.

111. WorldCom has proposed an exclusion for 'Verified Customer Not Ready' that is unworkable and unnecessary. The ILEC must not be held accountable for misses in due dates that are caused by the CLEC or by its end user. The better way to accomplish this is to have an exception for all situations in which the technician cannot get access to a customer's premise to complete the order, which would include "customer not ready." Moreover, the proposed

requirement of verifying each and every Customer Not Ready situation adds yet another layer of complexity to the provisioning process.

112. Finally, the measurement proposed by WorldCom actually contains two measurements in the section addressing the calculation. The second one is Percent Missed Due to Lack of facilities. This measurement is not necessary and does not add useful information to a measurement designed to determine whether commitments to customers are being met.

113. (15) Percent Timely Coordinated Conversions: BellSouth currently reports a similar measure called "Coordinated Customer Conversions – Hot Cut Timeliness % within Interval and Average Interval." The WorldCom-proposed measurement, however, is another confusing hybrid that attempts to measure several different and distinct events with one measurement. The definition states that the measurement "captures whether a coordinated cut begins on time and is completed within the appropriate time frame for the number of loops converted."[72] This language prompts two questions: 1) Did the cut start on time; 2) How long did it take? WorldCom's calculation of this measurement is essentially the cut interval divided by the number of conversions. This calculation completely ignores the first part of the definition, which is ostensibly designed to capture whether the cut started on time.

114. WorldCom's proposal also does not allow for the additional time required to complete a coordinated cut when the customer is served by an Integrated Digital Loop Carrier (IDLC) system. An IDLC cutover is much more complex than a cutover where the customer is served by facilities that are not integrated with the ILEC's switching equipment. Where a customer is served by non-integrated facilities such as copper wire, often the ILEC's central office technician can make the cutover at the central office frame, in conjunction with the

[72] WorldCom Comments, Appendix B, at 30.

CLEC's technician. When a hot cut involves IDLC, the ILEC must dispatch a technician prior to the hot cut scheduled time in order to make a line and station transfer (LST) to place the customer service on a non-integrated facility that includes the central office port. This additional work requires extra time for the technician and currently is performed before the scheduled hot cut. Although this extra work means additional costs to the ILEC, unless a technician is dispatched to perform the LST the day before the scheduled hot cut, the ILEC would not be able to meet the interval proposed by WorldCom for cutting over the loops.

115. Because of the additional work involved in cutting over loops currently served by IDLC, this benchmark should be revised to establish a four-hour interval for loops involving IDLC. This would allow the ILEC to dispatch the technician only once on the date the hot cut is scheduled to perform the LST and to call the appropriate centers when ready to perform the hot cut. The four-hour window would be 8 a.m. to 12 p.m. or 1 p.m. to 5 p.m. On hot cuts involving IDLC, the ILEC would notify the CLEC by 10:30 a.m. the day before the scheduled cutover to advise the CLEC that IDLC is involved and the four-hour window would apply. This is consistent with the approach in New York, where Verizon has a four-hour window to cut over a loop served on IDLC.[73]

116. Again, a measurement of the conversion interval is currently being produced by BellSouth. It is called the Coordinated Customer Conversions Interval. This measurement correctly states the average interval for all coordinated conversions during the month. WorldCom has not objected to this measurement in any state proceedings in the approximately 2 years since BellSouth began to produce this measurement. As noted above, BellSouth also has a

[73] New York Performance Assurance Plan Metrics and Corresponding Metric Guidelines, PR-9 (Hot Cut Loops).

"Coordinated Customer Conversions - Hot Cut Timeliness % within interval" measurement that captures whether a coordinated cut begins on time (*i.e.*, the missing part of the measurement proposed by WorldCom).

117. (16) (a) Average ILEC Caused Provisioning Outage Duration; (b) Percent ILEC Caused Provisioning Outages: BellSouth currently utilizes a measurement, "Coordinated Customer Conversions – Average Recovery Time," that is very similar to the proposed WorldCom measure. In fact, the measurement BellSouth uses is the same measurement proposed by WorldCom in the performance measurements proceeding in Georgia.[74] This measurement was subsequently approved by several Commissions including Georgia and Florida, and has been implemented by BellSouth.

118. WorldCom's second proposed measurement, '% ILEC Caused Provisioning Outages,' is also similar to BellSouth's proposed "Percent Provisioning Troubles within 5 days of Service Order Completion," which was discussed in BellSouth's Comments.[75] While it is important to restore service promptly, tracking the cause of an outage does not add enough useful information to justify the creation of an additional metric. WorldCom proposed a measurement similar to the % ILEC Caused Provisioning Outages measurement in Georgia and in Florida. These commissions rejected WorldCom's proposal. In evaluating a similar measurement proposed by WorldCom on behalf of the Alternative Local Exchange Carriers (ALECs) in Florida, the Florida Commission noted: "Upon consideration, we find that the measure proposed by the ALECs would be redundant to the Percent Troubles Within 7 days a Completed Service

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74 Georgia Docket 7892-U.

75 BellSouth Comments at 50-51.

Order metric."[76]

119. (17) Percentage of Orders Held 5,15,30 Days: As BellSouth stated in its Comments,[77] the proposal of the *Notice* to measure Open Orders in Hold Status is appropriate to capture the percentage of orders that are past the committed due date. BellSouth proposed to capture this information with its existing measure Mean Held Order Interval & Distribution Intervals. BellSouth believes that this measure should focus on the percentage of Orders that are past the committed due date as of the end of the reporting period, rather than the percentage of circuits. BellSouth believes that its proposed measurement, which is explained more fully in its Comments,[78] is a better alternative to capture the activity in question than the measurement proposed by WorldCom.

120. (18) Troubles Within 30 Days of Install/Order Activity: As BellSouth stated in its Comments,[79] incumbent LECs should measure installation quality as the percentage of completed orders for which CLECs file trouble reports within a limited period after the installation. Moreover, the 30 day interval offered for comment in the Notice needs to be shortened in order to increase the likelihood that trouble reports captured by the measurement are actually the result of the installation. Therefore, BellSouth proposed the measurement, Percent Provisioning Troubles within 5 days of Service Order Completion.

121. While WorldCom essentially proposes the same measurement (albeit with a longer interval), WorldCom has inappropriately proposed a benchmark even though a retail analog exists. Clearly, the troubles encountered by retail customers within 30 (or 5) days of

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76 *Florida Order* at 17.

77 BellSouth Comments at 56, ¶ 127.

78 BellSouth Comments at 56-60.

79 BellSouth Comments at 50, ¶ 115.

service order activity are analogous to the troubles encountered by CLEC customers within the same time period. Not only does WorldCom ignore this fact and propose a benchmark, but it proposes a benchmark of 1.5%. WorldCom argues in its Comments, that "this is a reasonable benchmark, one that many ILECs are capable of achieving on their retail products."[80] Even if a benchmark were appropriate (and it is not), the criteria for setting benchmarks is that the efficient CLEC have a meaningful opportunity to compete. WorldCom's opinion that some ILECs are capable of achieving a higher benchmark provides no legitimate basis to raise the standard.

122. (19) Mean Time to Restore: BellSouth agrees that Mean Time to Restore is a critical measure. BellSouth currently provides essentially the same measurement in its SQM in the form of "Maintenance Average Duration." As stated in BellSouth's Comments,[81] the appropriate ending time for this measurement interval is the time at which the customer is notified and confirms that service has been restored, rather than the time at which the CLEC is notified. WorldCom's proposed measure improperly utilizes CLEC notification as the end time.

123. A retail analog exists and should be utilized as the appropriate standard. WorldCom, however, argues for a rigid benchmark by suggesting that it is offering service level agreements that include trouble resolution intervals that may not be equivalent to those available to retail customers.[82] The ILEC's obligation is to provide parity of service. The ILEC is obviously not required to deviate from this standard based on private contracts between WorldCom and its end users.

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80 WorldCom Comments at 52.

81 BellSouth Comments at 64, ¶ 145.

82 WorldCom Comments at 52.

124. WorldCom also proposes a separate measurement for the Percent Out of Service > 24 hours. This is really a sub-set of "Mean Time to Restore" that captures the restorations taking longer than 24 hours. Thus, a separate measurement is not required.

125. (20) Trouble Report Rate: In its Comments, BellSouth proposed the measurement, Customer Trouble Report Rate, which it currently produces, and which measures the percentage of initial and repeated customer direct or referred troubles reported within a calendar month for each 100 line/circuits in service.[83] Because this measurement is very similar to a report used by all LECs to measure the overall maintenance experience of its customers, BellSouth submits that this measurement structure is preferable to that proposed by WorldCom.

126. Also, BellSouth has utilized Report Rate as an internal measurement for years. Thus, there clearly is a retail analog for this measurement. WorldCom ignores this fact and improperly proposes a benchmark near perfection (1 trouble per 100 access lines/loops). Further, WorldCom's proposed measurement does not exclude troubles that are not found, that test OK, or that are determined to be in the end-user's equipment, such as CPE. In a typical month, these constitute at least ½ to 1% of the total troubles reported. Thus, even if the ILEC had no troubles attributable to causes within its control, it would still be almost impossible to achieve the arbitrarily high benchmark proposed by WorldCom. The measure is even more unreasonable considering WorldCom's disaggregation proposal. It is very likely that an individual CLEC will not have 100 lines/loops at the individual sub-metric level (*i.e.*, after disaggregation by product, dispatch status and geography). Since the benchmark is set at 1%,

[83] BellSouth Comments at 61, ¶ 137.

any trouble would result in an automatic failure of this measurement for each submetric for which the individual CLEC has less than 100 lines/loops.

127. (21) Percent Repeat Troubles: BellSouth proposed a comparable measurement in its Comments and described in detail the way this measurement should be calculated.[84] BellSouth also noted in its Comments that there should be a business rule to limit the reporting of this measurement to those disaggregated submeasures for which there are more than 30 events in the reporting month.[85] The volume of repeat troubles should be extremely low. In other words, the better the service, the lower the number of repeat troubles. Having a reporting category that will, by design, have a very low volume of activity could lead to indications that disparate treatment exists when, in fact, there is none. Thus, it is appropriate to set a threshold for reporting purposes.

128. The appropriate performance standard for this measurement is parity. BellSouth has utilized Percent Repeat Troubles in 30 days as an internal measurement for years, so it is clear that a retail analog exists for this measurement. Given this, the use of a benchmark is not appropriate. However, WorldCom recommends a benchmark of 98%. WorldCom's approach is again contrary to this Commission's stated framework for determining parity, which favors a retail analog over a benchmark, if one exists.

129. (22) Percent of Customer Troubles Resolved Within Estimated Time: The measurement proposed by WorldCom is just another attempt to redefine an existing measurement. In this instance the existing BellSouth measurement is "Percent Missed Repair Appointments." This measurement is currently produced by BellSouth, and this measurement

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84 BellSouth Comments at 62-64.

85 BellSouth Comments at 63, ¶ 142.

has been accepted by CLECs, including WorldCom, in numerous states in BellSouth's territory. Missed Repair Appointments is a measure of the Troubles not cleared by the quoted Commitment Date and Time divided by the trouble reports closed in the reporting period. It is simply the inverse of the measurement proposed by WorldCom. There is no need to replace the existing measurement with the new measurement proposed by WorldCom.

130. WorldCom's expressed concern about tracking the actual time it takes to complete a repair as compared to a quoted repair time is misplaced.[86] The critical question is simply how long it takes to resolve a trouble once it is reported. Whether the time to repair quoted by the ILEC to a CLEC matches exactly is of comparatively little significance. The measure proposed by BellSouth focuses on the more important question of whether repairs are completed in a timely manner.

131. (23) Percent Trunk Blockage: WorldCom's proposed measurement is fraught with problems. This measurement attempts to capture the number of trunk groups that exceed blocking thresholds of .5%, 1% and 2% each month. Therefore, this measurement reports only trunk group blocking performance exceptions. That is, if the threshold is 2.0% and the blocking were actually 1.9%, it would not exceed the threshold and, as a consequence, would not be reported. Conversely, if the blocking threshold is 2.0% and the actual blocking were 2.1% or above, it would be reported as a group that exceeded the blocking criteria, regardless of the amount by which it actually exceeded the criteria. Further, the size of trunk groups is not considered in WorldCom's proposal. If a trunk group exceeded a blocking threshold, this measurement would note that the group exceeded the threshold, but would not give any information as to the size of the group. As a result, very small trunk groups or very large trunk

[86] WorldCom Comments at 54-55.

groups, both with the same percentage blocking, would be reported the same, even though there is a substantially different impact on the customer's calling experience.

132. Also, while WorldCom's proposal contains an exclusion for blockage caused by CLEC actions such as a shortage of CLEC switch terminations or CLEC facilities, under WorldCom's proposal, the CLEC would have to concur that its actions caused the blockage. This concurrence requirement would introduce unnecessary delay and bureaucracy into the measurement reporting process.

133. BellSouth does not believe that Trunk Blocking measurements are as important as the metrics proposed in the *Notice*, and that they should not be included in the national plan for this reason. However, if the Commission deems it appropriate to add a trunk blocking measurement, BellSouth proposes a measurement of blocking that it currently has in place. This measurement more closely matches the actual customer's experience and does not suffer the weaknesses noted above. With BellSouth's measurement, actual blocking performance by hour is reported. This measure is not influenced by blocking thresholds. Trunk group size is considered and the blocking is reported over a 24 hour period rather than a single busy hours. The report, Trunk Group Performance Report (TGP) displays trunk blocking in a manner that accurately represents the customer experience. The TGP report tabulates actual call blocking as a percentage of call attempts for all comparable trunk groups administered by BellSouth that handle CLEC and BellSouth traffic. Additionally, the TGP report provides a direct comparison of hour-by-hour blocking between CLEC and BellSouth trunk groups. BellSouth's trunk group blocking report, TGP-1, more accurately represents the comparative performance between BellSouth and CLEC than the measurement proposed by WorldCom.

134. (24) Percent Timely Collocation Responses: BellSouth currently provides under State plans a measure, "Collocation Average Response Time", which captures the average time from the receipt of a complete and accurate collocation application until BellSouth returns a response electronically or in writing. However, BellSouth does not believe that collocation measurements should be included in a national plan. Every State in BellSouth's region has either set specific intervals of their own, or utilized the default intervals established by this Commission. Collocation is an area in which the Commission has deferred to the States in setting appropriate performance intervals to date. BellSouth believes that this approach should continue. For this reason, BellSouth does not believe that the benchmarks advocated by WorldCom are appropriate for inclusion into a national performance monitoring plan. Moreover, even if collocation performance is measured in a national plan, BellSouth disagrees with the WorldCom proposal because it does not include an exclusion for applications cancelled by the CLEC. Also, the benchmarks are arbitrarily high, and would conflict with the standards set by many states.

135. (25) (a) Percent Collocation/Augment Appointments Met; (b) Average Collocation/Augment Interval: BellSouth currently reports at the state level the metrics "Collocation Average Arrangement Time" and "Collocation Percent of Due Dates Missed," which address the same areas of performance as the metrics proposed by WorldCom. For the reasons noted above in the discussion of the "Percent Timely Collocation Responses" measurement, collocation intervals should be addressed at the State level, not as part of a national plan.

136. (26) NXXs/LRNs Loaded Before LERG Effective Date: The WorldCom proposed measurement exists in several ILECs' measurement plans, including BellSouth's

measurement plan. However, this measurement is not one of the more critical metrics, as compared to the set of measurements proposed in the *Notice*. Furthermore, to the extent that a NXX or LRN was not loaded before the effective date of the Local Exchange Routing Guide, it would create trouble reports that would be reported and captured in the maintenance and repair measurements, such as Provisioning Troubles within 5 days (30 as proposed in the *Notice*) of a Service Order Completion, Trouble Report Rate, Time to Restore/Maintenance Average Duration and Repeat Trouble Report Rate. Therefore, this measurement should not be included in the national plan.

137. (27) Timeliness of Daily Usage Feed: BellSouth currently reports the data in question through its Usage Data Delivery Timeliness measure, which provides the percentage of recorded usage data that is delivered to the appropriate CLEC within six business days. The standard proposed by BellSouth in the States within its region has been 95% (6 calendar days). While some States within BellSouth's region require parity with retail, no State in BellSouth's region requires a standard of 98% within 3 days, as proposed by WorldCom.

138. (28) Timeliness of Carrier Invoice: BellSouth currently reports similar data through its "Mean Time to Deliver Invoices" metric. This metric measures the mean interval for the timeliness of billing records delivered to CLECs in an agreed upon format. Since there is an analogous retail process, the use of a benchmark, as proposed by WorldCom, is inappropriate.

139. (29) (a) Billing Error Correction Requests Acknowledged in X Hours; (b) Billing Errors Corrected in X Days: BellSouth does not currently report "Billing Errors Correction Requests Acknowledged in X Hours" in any States in its region (although The "Billing Errors Corrected in X days" has only been adopted Florida). BellSouth does not believe either of these measures should become part of a national performance monitoring plan, as WorldCom suggests,

because they have only limited practical significance. Consistent with this, most states in BellSouth's region have declined to adopt these measurements.

B. Allegiance Proposal

140. (1) Serial Rejects on Same Order: BellSouth agrees that the timeliness of reject Notices is a critical measure that should be included in any national performance measurements plan adopted. However, Allegiance's suggestion that ILECs should be required to identify every error on an LSR before sending the rejection is not reasonable. There are fields in the service request that are dependent upon one another. The correction of an error in one field may mean that information in a related field that appeared to be correct, would no longer be valid. At that point, the service request would have to be rejected again. In order to meet the benchmark suggested by Allegiance, that 95% of reject notifications should identify all errors on the order, the ILEC would be placed in the position of anticipating the intent of the CLEC.

141. Furthermore, the proposed calculation of the measurement[87] completely ignores the fact that the CLEC can submit orders repeatedly with new errors. The ILEC should not be held accountable for these errors.

142. (2) Timely Coordinated Hot Cut Conversions for UNE Loops: The *Notice* did not include this measurement as one of the proposed core measurements. BellSouth believes that the provisioning measurements proposed in the *Notice* are sufficient to assure nondiscriminatory performance by the ILECs. Therefore, BellSouth is opposed to the addition of this measurement.

143. However, should the Commission decide that this measurement is necessary, BellSouth currently produces this measurement, as described by Allegiance, but with a

[87] The proposed calculation: the number of orders with multiple errors rejected more than once divided by total number of reject orders. Allegiance Comments, Appendix A, p. 2.

benchmark of 95%≤15 minutes. This measurement is calculated by taking the entire cut-over time frame divided by the number of items worked in that time frame to give the average per item interval for the service order. BellSouth believes that this is the appropriate way to calculate this measure.

C. Covad Proposal

144. (1) FCC-POQ-1: Percent Slid FOCs; FCC-POQ-2: Percent FOC In Interval: The measures *Percent Slid FOCs and Percent FOC In Interval* proposed by Covad are aimed at identifying changes in confirmed due dates initiated by the ILEC, and intervals originally offered to the CLEC that are outside of standard intervals. BellSouth believes these two measures are unnecessary. The asserted need for the *Percent Slid FOCs* measure is that an ILEC will ask a CLEC to supplement or cancel an order just so that a due date will not be missed. However, the CLEC is not obligated to do so. The CLEC can simply refuse to cancel or supplement the order. Also, the provisioning measurement, *Percent Missed Installation Appointments* proposed by BellSouth will capture any delays caused by the ILEC. In any event, a retail analog exists, which makes Covad's proposal to utilize a benchmark inappropriate.

145. Also, if Covad is concerned that an ILEC could potentially offer due dates or completion intervals to CLECs that are outside standard intervals, the measure *Order Completion Interval (OCI)* proposed by BellSouth would capture any disparate treatment in this area. The *OCI* metric is a parity measure that compares the average completion interval for CLEC orders to the average completion interval for ILEC orders. This measurement would identify any tendency on the ILEC's part to offer longer intervals to CLECs than it offers its retail operation, which is the specific concern at issue. Therefore, the *Percent FOC Interval* measure that Covad proposes is not needed.

146. (2) FCC-OPQ-3: Percent Interval Met**;** Covad's proposed measure *Percent Interval Met* is unnecessary. As discussed previously, BellSouth's *Percent Missed Installation Appointments* measure captures how well an ILEC performs in meeting due date commitments to CLECs versus retail performance. Covad appears to propose this measure based on a concern that the ILEC might exceed certain set intervals for providing service. Again, the relevant inquiry is whether the ILEC's completion interval for CLEC orders is substantially the same as the ILEC's retail order completion intervals. BellSouth's proposed measure *Average Completion Interval* captures this comparison. Therefore, Covad's proposed measure *Percent Interval Met* is unnecessary and should not be considered in any national performance measurements set adopted by this Commission.

147. (3) FCC-MRI-2: % Repairs Completed in X.: The measure *Percent Repairs Complete in X* proposed by Covad is also unnecessary. This measure is designed to track the percentage of repair tickets completed within specific intervals. It is the inverse of the measurement, *Percent Missed Repair Appointments*, which measures the percentage of time that the ILEC is not able to meet repair commitments. In addition, BellSouth proposed the measure *Maintenance Average Duration*, which is equivalent to the measure *Mean Time to Restore* recommended by Covad. The *Maintenance Average Duration* measure compares the average repair/restoration intervals for CLECs to the average repair/restoration intervals for ILEC retail customers. This is the relevant evaluation based on the requirements on the Act. The *Percent Repairs Complete in X* measurement proposed by Covad is not needed.

D. Other Proposals

1. Audits

148. WorldCom asserts that in order "preserve the integrity of the performance reporting,"[88] each CLEC must be allowed to conduct one audit per calendar quarter, in addition to an independent annual audit. An audit per quarter, per CLEC, is not needed to validate the data collected for a measure. BellSouth currently provides CLECs with the raw data underlying many of BellSouth's performance measurement reports, as well as a user's manual on how to manipulate the data into reports. The CLECs can use these raw data to validate the results in the BellSouth SQM reports posted every month on the BellSouth web site.

149. WorldCom also proposes that the requesting CLEC would pay for the audit, assuming no "inaccuracies" are found in the ILEC reports, but does not define the term.[89] Given the substantial amount of money at stake, this approach would likely engender a great deal of contention as to what constitutes an "inaccuracy" of the sort that should shift the obligation to pay for the entire audit. Also, and more importantly, the cost of the audit is not just out-of-pocket cost. An even greater cost relates to the substantial resources BellSouth, or any ILEC subject to such audits, would have to expend during the audit process.

150. For example, there are approximately 300 CLECs operating in the BellSouth region. If "each carrier customer must be allowed to conduct one audit per calendar quarter," as WorldCom advocates,[90] this translates into the potential for 1200 audits per year (300 CLECs

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88 WorldCom Comments at 23.

89 WorldCom Comments at 23.

90 WorldCom Comments at 23.

times 4 quarters). BellSouth has been involved in a comprehensive annual audit in Georgia that has lasted approximately 2 years. While the scope of the audit suggested by WorldCom is not likely to be as broad as this comprehensive audit, there is nothing in WorldCom's proposal to limit its scope.

151. In short, WorldCom's proposal would require, in BellSouth's case: 1) a comprehensive audit each year, 2) access to monthly raw data (complete with a raw data user's manual), and 3) up to 1200 CLEC requested audits a year, without any process of screening requests for validity. This proposal is entirely unreasonable.

2. Geographic Disaggregation

152. As discussed previously, WorldCom's disaggregation would convert the 36 measures it proposes into more than 4,000 sub-measures per state. If adopted, WorldCom's approach would obliterate the *Notice's* stated goal of streamlining measurements and reducing regulatory burdens. One of the principal drivers in WorldCom's proposal to this untenable number of measurements is geographic disaggregation.

153. As reflected on Attachment 1, the geographic disaggregation into four zones, along with WorldCom's proposed product disaggregation, results in over 2,000 submeasurements for provisioning, and more than 1,000 submeasures for the single measure *% Jeopardy Notice*. Moreover, WorldCom proposes this staggering number of metrics based on geographic disaggregation with nothing more than the thinnest of anecdotal support. Specifically, WorldCom states that a third party auditor concluded that New York City "appears" to receive a different level of service than the rest of the state.[91] This is far too little to justify the additional of literally thousands of submeasures on a national basis.

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[91] WorldCom Comments at 29.

154. Cox also proposes geographic disaggregation, [92] which BellSouth opposes, in part, for the reasons listed above. The Cox proposal is also impractical because it would entail disaggregating by LATA. First, the geographic boundaries defined by state LATAs do not necessarily represent different operational or structural processes that would cause for differing treatment of CLECs from one to the next. To the contrary, organizational structures and responsibilities often overlay LATA boundaries.

155. Second, beyond the organizational overlap of LATA responsibility, physical LATA boundaries sometimes overlap state boundaries. Since the sum of the data reported for the individual LATAs in a given state would not match the state total, this would require additional administrative effort to reconcile and/or explain the differences. Even if geographic disaggregation below the state level were necessary, using LATA boundaries for this purpose is clearly impractical.

VIII. THE CLECS' PROPOSALS FOR AUTOMATIC AND OTHER PENALTIES MUST BE REJECTED

156. Collectively, the CLECs propose an astounding array of unwarranted and unsupportable transfer payments from ILECs to CLECs. The CLECs almost uniformly advocate that all state penalties stay in place, and that federal penalties be added to state penalties. Further, the CLECs advocate automatic penalties in astounding amounts (albeit under a variety of labels designed to disguise the fact that what they request really are penalty payments). These include forfeitures pursuant to Section 503[93], damage payments[94], the involuntary inclusion of

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92 Cox Comments at 17.

93 Focal et al. Comments at 27-33.

94 McLeodUSA Comments at 11.

liquidated damages clauses in contracts[95], mandatory refunds[96], and the ability to obtain additional payments through individual complaints[97]. Finally, at least some CLECs argue that every one of these remedies should be cumulative,[98] so that a CLEC could obtain "compensation" in amounts many times over any damage actually caused by the CLEC's failure to perform.

157. Taken together, the CLECs' arguments for massive penalty payments (much of which they would receive) constitute a disturbing display of naked greed. These proposals must be rejected because: 1) most of the proposals for automatic penalties (and otherwise) are in blatant conflict with the requirements of law; 2) the CLECs' proposals for almost unlimited penalties have no rational basis whatsoever and, if adopted, would create exceedingly poor public policy that would subvert the purposes of the Act.

158. The contention of virtually every CLEC that the Commission should order automatic penalties without the consent of the ILECs is legally unsupportable. As stated previously, it would appear that most CLECs support the creation of a national measurement plan principally for the purpose of putting into place a framework to support a national penalty plan. At least one CLEC, AT&T, goes so far as to argue that the present state measurements are adequate, but that the Commission should add federal penalties to the penalties that are already payable under state plans. AT&T's theory is that State plans are ineffective because they all

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95 Focal et al. Comments at 23-27; Business Telecom Comments at 9-12.

96 Cox Communications Comments at 20-21; Competitor Coalition (Dynegy et al.) Comments at 21.

97 Focal et al. Comments at 22-23 n.39, 33-34; Allegiance Comments at 32.

98 Focal, et al. Comments 20-34 ; Business Telecom Comments at 4-12, Cox Comments at 20.

prescribe a cap on ILEC liability that would apply at some point.[99] Apparently, the only penalty plan that will satisfy AT&T is a plan that allows payments without limit. What AT&T neglects to mention is that the use of a plan with a meaningful cap of liability has been repeatedly endorsed by this Commission.[100] AT&T's latest gambit should be rejected once again.

159. The other CLECs argue (vaguely) for the imposition of a federal measurement plan, but are extremely clear on one point: they want massive penalties to apply automatically, without following the required statutory procedures. The Commission's authority to transfer money from one carrier to another is limited. Damages, penalties, forfeitures, or transfer payments by any other name can only be ordered under the specific circumstances that are provided by statutory authority. Of course, there are statutes that provide this specific authority, under specific circumstances that are clearly defined. Two examples of these statutes are Section 503 (regarding forfeiture penalties), and Section 208 (regarding damages).

160. Nevertheless, many of the CLECs that demand automatic penalties ignore this statutory scheme altogether. Some demand penalties without providing any theory under which the Commission would have the legal authority to order these penalties.[101] These CLECs completely ignore the statutory scheme that makes clear that, even though the Commission has broad authority to make rules regarding the implementation of the Act, its authority to levy

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99 AT&T Comments at 25-26.

100 *See Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Authority to Provide In-Region InterLATA Services in Texas*, CC Docket No. 00-65, filed Jan. 10, 2000; *Application by New York Telephone Company (d/b/a Bell Atlantic – New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company, and Bell Atlantic Global Networks, Inc., for Authorization to Provide In-Region, InterLATA Services in New York*, CC Docket No. 99-295, filed Sept. 29, 1999.

101 *See*, *e.g.*, Mpower Comments at 10-12; AT&T Comments at 28-33; WorldCom Comments at 20-23.

penalties for the violation of these rules, or to award damages to complainants, is narrower, and very specifically defined. If Congress has intended to delegate to the Commission unfettered discretion to levy penalties or award damages in any way it saw fit, then the applicable statutes would provide to this effect. Instead, Congress set forth specific procedural mechanisms, and those mechanisms must be followed in order to levy penalties or forfeitures or to award damages.

161. Other CLECs argue for the payment of penalties in ways that expressly contradict the statutory requirements. For example, Sprint states that it "believes Sections 206-208 authorize the Commission to set self-effectuating damages for failure to meet the standards of each performance measurement."[102] Sprint, however, conveniently ignores the fact that Section 208 sets forth a complaint procedure that must be followed, and Section 209 provides that damage awards arising from complaints can only be made after a hearing is held.[103]

162. Allegiance makes a more complex argument that is, nevertheless, still just a plea to ignore the statutory requirements. Allegiance first acknowledges that damages pursuant to Section 206 cannot be awarded without a hearing. Allegiance then argues that the Commission can satisfy the requirement for a hearing without actually having one.[104] The ostensible basis for this sophistry is *AT&T v. FCC.*[105] This case involved a rulemaking proceeding by the Commission to address restrictions relating to private line services. AT&T did not contest the actual result of the process, and it participated fully in the rulemaking proceeding. Nevertheless, AT&T claimed that it was entitled, pursuant to the language of Section 205, to a "judicial type" hearing in which evidence would be received. The basis for this contention was that there was

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102 Sprint Comments at 10.

103 47 U.S.C. §§ 208, 209.

104 Allegiance Comments at 43-44.

105 572 F.2d 17 (2d Cir. 1978).

no "economic analysis of the impact of the FCC's decision."[106] The Court rejected this argument, and stated that the Commission could make broad policy decisions in the context of a rulemaking while leaving until later the process of fine tuning rules to account for the economic impact of the policy decisions.

163. Our situation is clearly different. Nevertheless, Allegiance attempts to misapply the case authority by the illogical claim that future "damages" can be assessed in the context of a rulemaking because "the issues are generic and [because] specific factual circumstances affecting different carriers are not implicated."[107] This is preposterous. Damages reflect a factual assessment of the amount of injury that has been caused to a party, and a determination of the amount of money that will compensate the injured party.[108] The specific factual findings necessary to award damages can only be made on a case by case basis.

164. Moreover, in the context of performance measurements, it would be virtually impossible to make these findings prospectively. In the various State proceedings that have been held, witnesses for CLECs have acknowledged that it would be virtually impossible to determine the amount of economic harm, *i.e.*, damage, that would result to any given carrier as a result of a future failure to meet any given measurement.[109] The notion that the Commission could utilize a

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106 *Id.* at 23.

107 Allegiance Comments at 44.

108 "A party's financial loss is the ultimate measure of his damage [citations omitted], and the purpose of a damage award is to compensate the injured party for loss resulting from the conduct of the wrongdoer, 'not to penalize the wrongdoer or to allow plaintiff to recover a windfall,'" *Cordeco Development Corp v. Santiego Vasquez*, 539 F. 2d 256, 262 (1st Cir. 1976), quoting, *Farmers and Bankers Life Insurance Co. v. St. Regis Paper Co.*, 456 F 2d 347, 351 (5th Cir. 1972).

109 For example, during the hearing in the Florida case *In the Matter of Investigation into the establishment of Operations Support Systems Permanent Performance Measures for Incumbent Local Exchange Telecommunications Companies*, Docket No. 000121-TP, AT&T witness Cheryl Bursh testified on April 27, 2001 that "the economic cost . . . is almost impossible to pinpoint." Transcript, p. 1025.

rulemaking to come up with some sort of figure that would constitute a "one size fits all" payment of actual damages, which would be appropriate for every carrier, every measurement and every circumstance is simply ridiculous. The reality is that, despite Allegiance's efforts to mislabel what it really seeks, it is not after damages at all, but rather penalties. Moreover, whether the payments at issue are called damages or penalties, the statute requires that a hearing be held to make the determinations necessary to levy either.

165. Cox is another party that essentially argues that the statutory requirements should be ignored. Specifically, Cox contends that "the Commission should create internal procedures that make the imposition of forfeitures essentially routine . . .".[110] In other words, Cox argues for the Commission to use "internal procedures" to avoid the procedural requirements of § 503.[111] BellSouth submits that when a controlling statute specifically sets forth a procedure that must be followed before an action is taken, the Commission lacks jurisdiction to simply discard the statutory requirements and replace it with a different procedure.

166. Finally, several CLECs want automatic penalties to be set at the maximum statutory amount, and for the Commission to compel ILECs to place liquidated damage clauses in interconnection agreements.[112] However, a valid liquidated damage clause represents an effort by the parties to make a reasonable approximation of the damage that would be caused by a breach of the contract.[113] Liquidated damage provisions are not penalty clauses, and if the

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110 Cox Comments at 30.

111 47 U.S.C. § 503.

112 Business Telecom, Cavalier Telephone, DSL net, Network Telephone and RCN Telecom, filed comments jointly. They are referred to collectively herein as "Business Telecom."

113 "[T]he essence of liquidated damages 'is a genuine covenanted pre-estimate of damages.'" *Dahlstrom Corp. v. State Highway Commission*, 590 F2d 614, 615 (5th Cir. 1979), quoting *Shields v. Early*, 132 Miss. 282, 95 So. 839, 841 (1923); "It is well settled in New York that a clause in a contract providing for the payment of a fixed amount upon a breach of any provision in that contract, no matter how trivial the breach, cannot be sustained as a liquidated

damage assessment appears to be punitive, it is generally disallowed.[114] Moreover, negotiating liquidated damages is a voluntary process. It is entirely inconsistent with this process to request that a regulatory agency coerce any party into agreeing to damages or penalties in the context of a contract. Business Telecom claims that several states have sustained this approach. In BellSouth's experience, this approach has been attempted many times by CLECs, and it has been routinely rejected by State Commissions.[115]

167. The extent to which the penalty proposals of the CLECs depart from reason is perhaps best reflected in the suggestion of Business Telecom, that not only should forfeitures be set at the statutory maximum and applied automatically, but that the $1.2 million maximum should apply each month to each submetric, which would be geographically disaggregated under their proposal to the Metropolitan Service Area (MSA) level.[116] To understand the magnitude of what these CLECs propose, consider that the WorldCom proposal contains over 4,000 submeasures. If this plan were adopted along with the forfeiture proposal of Business TeleCom,

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damages provision since it does not represent an estimate of prospective actual damages. Rather, such a clause is considered to be an unlawful penalty and is therefore unenforceable." *John T. Brady & Co. v. Form-Eze Systems, Inc.*, 623 F. 2d 261, 263 (2d Cir. 1980), *cert. denied*, 449 U.S. 1062, 101 S. Ct. 786, 66 L. Ed. 605.

114 "Courts will not enforce . . . a [liquidated damages] provision if it operates as a penalty or forfeiture clause [citations omitted]. The law is clear that contractual terms providing for the payment of a sum disproportionate to the amount of actual damages exact a penalty and are unenforceable." *Leasing Service Corp. v. Justice*, 673 F. 2d 70, 73 (2d Cir. 1982).

115 *In Re: Petitions by AT&T Communications of the Southern States, Inc., MCI Telecommunications Corporation, MCI Metro Access Transmission Services, Inc., American Communications Services, Inc. and American Communications Services of Jacksonville, Inc. for arbitration of certain terms and conditions of a proposed agreement with BellSouth Telecommunications, Inc. concerning interconnection and resale under the Telecommunications Act of 1996*, Docket Nos. 960833-TP, 960846-TP and 960916-TP, *Final Order on Arbitration*, Order No. PSC-96-1579-FOF-TP, 96 FPSC 12:508, 1996 Fla. PUC LEXIS 2352 (Fla. Pub. Serv. Comm'n Dec. 31, 1996); *In the Matter of: The Interconnection Agreement Negotiations Between AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C.*, Case No. 96-482, *Order* (Ky. Pub. Serv. Comm'n Feb. 6, 1997)

116 Business Telecom Comments at 7-8.

this could result in a possible maximum penalty of 4.8 billion dollars per state, or 240 billion nationally, each month.[117] If this proposal were not absurd enough, these CLECs also propose "self-executing" liquidated damages to be paid directly to CLECs in addition to the billions of dollars in automatic forfeitures.[118]

168. The degree of penalties that the CLECs demand is astounding. Their justifications for these demands are equally astounding. The CLECs' arguments, taken together, constitute a vain attempt to cloak naked greed in the mantle of public policy. The CLECs argue in very general terms that massive transfer payments and forfeitures in crippling amounts must be levied upon ILECs so that they will be punished to the point that their natural tendency to discriminate will be thwarted.[119] Under this theory, the only danger is that a penalty payment will be too small. Further, if the CLECs happen to be the beneficiaries of excessive penalties in massive amounts, more the better. The reality, however, is that setting penalties at excessive levels carries just as much danger as setting penalties that are inadequate.

169. Dr. William E. Taylor, an economist, filed a Reply Affidavit on behalf of BellSouth in CC Docket No. 01-277.[120] In this affidavit, Dr. Taylor addressed the situation in which penalties are set too high. Specifically, he stated that excessive penalties can encourage

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[117] 4,000 submeasures x $1.2 million = $4.8 billion x 50 (states) = $240 billion. Moreover, this estimate substantially understates the maximum payment under Business TeleCom's proposal since it requested penalties on an MSA basis. Some states have ten or more MSAs. BellSouth used only four geographic areas per state to calculate the number of submeasures in WorldCom's proposal. BellSouth also rounded the WorldCom proposal (of 4,352 submeasures) down to an even 4,000 to simplify this illustrative example.

[118] Business Telecom Comments at 9.

[119] Business Telecom Comments at 4-5; Focal et al. Comments at 20-22; WorldCom Comments at 20-21.

[120] *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, CC Docket No. 01-277; Reply Affidavit of William E. Taylor, Ph.D., November 13, 2001 ("Reply Affidavit").

CLECs to engage in a type of action described in economic terms as "moral hazard." As Dr. Taylor stated,

> Broadly defined, moral hazard is a form of gaming by which one party to a plan or contract may act in ways—within the framework of the existing plan—that allow it to gain in unanticipated competitive or financial advantage at the expense of the other party.[121]

Dr. Taylor went on to describe some forms of moral hazard behavior by CLECs that a plan having excessive penalties can promote:

- *Reward lack of cooperation*. CLECs could have less incentive to report operational problems to BellSouth in a timely manner. The longer a problem goes uncorrected, the greater would be the compensation available.
- *Maximum opportunities for unearned income to CLECs*. Reliance on arbitrary rules to set penalties could result in a SEEM[122] setting disproportionately severe penalties for relatively minor disparities. However, not every service failure would cause a CLEC customer to permanently change suppliers. . ..
- *Discourage investment by CLECs*. The opportunity for unearned income could discourage the CLECs from investing in their own facilities, especially if such investment were to cause those carriers to lose a lucrative source of income.
- *Encourage inefficient entry*. Firms that are inefficient relative to BellSouth could nevertheless see an opportunity to enter the market in the expectation of receiving penalty payments from BellSouth. This would be precisely the same effect that providing a subsidy would have in inducing entry by inefficient firms.
- *Entrapment by CLEC*. CLECs could have an incentive to force BellSouth into situations of non-compliance. For example, by choosing to provision hard-to-serve end-users, presenting service requests that are calculated to cause bottlenecks and delays in BellSouth's response, or basing service requests on deliberately underestimated service requirements (with a subsequent upward revision in those requests that BellSouth could not possibly fulfill quickly), those carriers could increase the risk of BellSouth's non-compliance.[123]

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121 Reply Affidavit at 74-75.

122 Self Effectuating Enforcement Mechanism.

123 Reply Affidavit at 75.

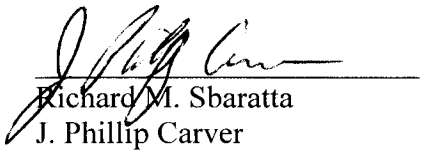
170. Obviously, if a penalty plan provides an excessive, unwarranted transfer of payments to CLECs, then CLECs will be encouraged to make maximizing the receipt of penalties their primary business strategy, especially if the penalties are so excessive that they eclipse the profit a CLEC could achieve by serving customers. Moreover, even if the penalties are not paid to CLECs (*e.g.* forfeitures), setting penalties at levels that will financially cripple incumbents, will still work to the obvious advantage of CLECs, and it will do so in a way that is detrimental to the development of appropriate competition. Without question, there are dangers to setting penalties in a performance measurement plan that are too high. The contention by the CLECs to the contrary is flatly wrong.

IX. CONCLUSION

171. For the reasons described herein, there is a pressing, immediate need for a national measurement plan to replace the disparate state plans now in effect. The Commission clearly has the authority to order such a plan. Doing so is the only realistic method to streamline the measurement process and ensure a consistency of measurements that will further the goals of the Act. BellSouth supports having reasonable a penalty plan to be utilized with a national measurement plan. However, the unreasonable penalty proposals of the CLECs must be rejected.

Respectfully submitted,

BELLSOUTH CORPORATION

By: 

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Dated: February 13, 2002

Attachment 1

QUANTITY OF MEASURES PER STATE

CLEC	NUMBER OF MEASURES	NUMBER OF SUB-METRICS PER STATE
COVAD	13	50
ALLEGIANCE	13	60
WORLDCOM	36	4,352

1. In the case of Covad and Allegiance the numbers were calculated from the attachments to their Comments.
2. The WorldCom numbers were calculated based on the attachments to its Comments as well as additional levels of disaggregation described in the Comments that were not specifically identified in the Attachment, e.g. volume disaggregation for ordering and provisioning, total vs. design flow-through, additional diagnostic measure for % Software Error Corrections.

BREAKDOWN OF MEASUREMENTS
INTO SUB-METRICS PER STATE

COVAD

MEASUREMENTS	SUB-METRICS
% FOC Received On Time	4
% % Service Order Reject On Time	4
% Slid FOCs	4
% FOCs in Interval	4
Average Delivery Interval	4
% Joint Acceptance Test	2
% Commitment Met	4
% Interval Met	4
Mean Time to Repair	4
% Repair Complete in "X"	4
Installation Quality	4
Repeat Troubles in 30 Days	4
% Trouble Ticket Rate	4
total	**50**

ALLEGIANCE

MEASUREMENTS	**Facility** Check	**Work – Arounds**	**Product**	**Volume**	**Interface** Type	TOTAL SUB-METRICS
% On Time LSR/FOC	2		3			6
Serial Rejects			3			3
Jeopardy Notices			3			3
FOC Interval after No Facility Jeopardy Notice			3			3
Installation Interval			3			3
Coordinated Hot Cut Conversion for UNE Loops			3	5		15
Delay Days on Missed Installation Appointments			3	3		9
Orders Completed			3			3
Quality of Conversion/Installation			3			3
Mean Time To Repair			3			3
Repeat Trouble Report Rate			3			3
OSS Availability					4	4
Software Problem Resolution		2				2
total						**60**

BREAKDOWN OF MEASUREMENTS
INTO SUB-METRICS PER STATE

WORLDCOM

PreOrdering/Change Control/General OSS

MEASUREMENTS	Interface Type	Type of Query	Work-Around	Level of Disag.	Product	Volume (from cmts.)	Dispatch No-Dispatch	Geography	Total vs. Design (from cmts.)	<24, 24-48, >48 hrs. (from cmts.)	SUB-METRICS
1. % System Availability	5										5
2a. Query Response Time	5	19									95
2b. % Sys. Error Timeouts	5	19									95
3a. Chg. Mgmt. Sent On Time											1
3b. Avg. Delay Days											1
4a. % S/W Error Correction			2	2							4
4b. Avg. Delay hrs/days			2	2							4
5. Ctr. Response in X days				9							9
6. % Order Accuracy					5						5
7. % Flow-Through				4					2		8
8. % On Time LSR/FOC				5		2					10
9. % On Time Reject Notice				3		2					6
10. % Jeopardy Notice					21	2	2	4		3	1008
11. % On Time Compl. Not.				2		2					4
12. % Timely Loss Not.				2							2
total											**1257**

Provisioning

MEASUREMENTS	Product	Dispatch No-Dispatch	Geography	Level of Disag.	Total Met vs. % Missed - No Facility	Volume (from cmts.)	SUB-METRICS
13. Avg. Completion Intvl.	22 1*	2	4 4			2	352 4
14. % Ord. Compl. On Time	22 1*	2	4 4		2		704 4
15. % Timely Coord. Conv.			4	2		6	48
16a. Outage Duration			4				4
16b. % Outages			4				4
17. % Order Held (5,15,30 days)	21 1*	2	4 4		2	2	672 4
18. Troubles within 30 days	22	2	4			2	352
total							**2,148**

BREAKDOWN OF MEASUREMENTS INTO SUB-METRICS PER STATE

Maintenance & Repair

MEASUREMENTS	Product	Dispatch No-Dispatch &OOS>24	Geography	SUB-METRICS
19a. Mean Time To Restore	23	2	4	184
19b. % OOS > 24 hrs.	23	2	4	184
20. Trouble Report Rate	23	2	4	184
21. Repeat TRR	23	2	4	184
22. % Trbls. Resolved in X	22	2	4	176
total				**912**

Network Performance

MEASUREMENTS	Dedicated Final	Geography	Disagg.	SUB-METRICS
23. Trunk Blockage	3		2	6
24. % Timely Collocation Response			8	8
25a. % Collo. Due Date Met			5	5
25b. Interval			5	5
26. NXX/LRN Loaded by LERG Effective Date				1
total				**25**

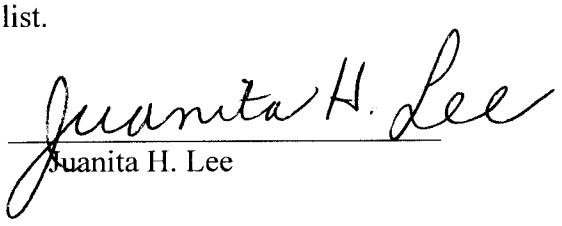
Billing

MEASUREMENTS	Disagg.	SUB-METRICS
27. Timeliness of Daily Usage Feed	2	2
28. Timeliness of Carrier Invoices	3	3
29a. Billing Error Correction Req. Ack. in X hours	3	3
29b. Billing Errors Counted in X days	2	2
total		**10**

TOTAL MEASUREMENTS	TOTAL SUB-METRICS PER STATE
36	**4,352**

CERTIFICATE OF SERVICE

I do hereby certify that I have this 13th day of February 2002 served the following parties to this action with a copy of the foregoing **REPLY COMMENTS OF BELLSOUTH CORPORATION** by electronic filing and/or by placing a copy of the same in the United States Mail, addressed to the parties listed on the attached service list.



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